IN THE

Supreme Court of the United States.

October Term, 1903.

No. 65.

JACOB GERTGENS, PLAINTIFF IN ERROR,

vs.

JOHN P. O'CONNOR,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Argument for Plaintiff in Error.

STATEMENT.

This was an action in ejectment commenced by the defendant in error against the plaintiff in error in the District Court, 16th Judicial District, in the State of Minnesota, to recover the possession of the southwest quarter of section nine (9), in township one hundred and twenty-five (125), in range forty-five (45) west.

The plaintiff in error, defendant below, filed an answer in denial and by way of counter-claim and cross-complaint alleging that he was in possession under a superior title based upon his settlement, residence, improvement, and cultivation of the tract, as public lands of the United States and his application therefor as a homestead, followed by his contest in the land department against John Ireland, plaintiff's grantor, who claimed the land under act of March 3, 1887, as a purchaser from the St. Paul, Minneapolis and Manitoba Railroad Company; and that Ireland was not a purchaser in good faith from said company within the meaning of the said act of March 3, 1887, asking that the plaintiff be declared and held trustee of the title acquired by him for the defendant's use and benefit, and that he be required by the decree of the court to properly convey the premises to the defendant by proper deeds of conveyance, and in case of his refusal or neglect so to do that the decree of the court stand in lieu thereof as a conveyance of the premises to the defendant.

To this answer plaintiff replied in denial and set up the title of his grantor by patent from the United States, based upon said application of Ireland to purchase.

The case was tried upon an agreed statement of facts which embraced the evidence upon which the land department took action in the case, with a stipulation reserving the right to either party to object to any of such evidence as incompetent, irrelevant, or immaterial.

The record shows numerous objections made by the defendant to such evidence, as well as to the additional evidence offered by plaintiff, were sustained by the trial court.

The district court held that the action of the land department in permitting Ireland to purchase the land by virtue of his alleged contract was erroneous; but that the land had been withdrawn in 1869 for the benefit of the St. P., M. and M. Railroad Company and had never been restored to settlement or entry, and hence there was no time after said date when the defendant could acquire any right by his settlement and residence on and cultivation and improvement of the land or by his application to enter the same under the homestead law.

From that decision the defendant appealed to the Supreme Court of the State.

This decision was affirmed by the Supreme Court.

From the decision of the Supreme Court of the State plaintiff in error brings the case to this court by writ of error for consideration and judgment.

The Issues.

The errors assigned raise a number of questions, the more important of which are—

1st. The question of the rights the plaintiff in error acquired by virtue of his homestead claim.

2d. Whether Ireland ever had such a contract of purchase with the railroad company as to authorize his purchase from the United States under the act of March 3, 1887, in the face of the duly asserted claim of defendant under the homestead law.

The Status of the Land.

The answer to the first question involves an examination of the record with a view to determining the exact status of the land in controversy on April 15, 1891, the date of the settlement of plaintiff in error under the homestead law.

The Withdrawal Revoked by Act of September 29, 1890.

That the land was withdrawn by virtue of section 7 of the act of March 3, 1865 (13 Stats., 526), for the benefit of the said St. P., M. & M. Railroad Company, and notice of such legislative withdrawal given by the Commissioner to the local officers May 25, 1869, is not disputed. Said section 7 is in the words and figures following, to wit:

> "Section 7. And be it further enacted, That as the governor of the said State of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads and branches, then it shall be the duty of the Secretary of the Interior to withdraw from the market the lands embraced within the provisions of this act."

How, and when was this withdrawal revoked? We will now address ourselves to this inquiry.

That this withdrawal was not revoked in 1887, by Secretary Lamar, because it was claimed it was a legeslative withdrawal, and, therefore, beyond the power of the Secretary to revoke it, is made clear by the Departmental decision of May 22, 1891, under the administration of Secretary Noble (12 L. D., 541). In that case, referring to the rule entered on certain land-grant railroad companies, including the St. Paul, Minneapolis and Manitoba Railroad Companies and some others, embraced in the act of March 3, 1865, on December 30, 1890, to show cause why the indemnity withdrawals for their benefit should not be revoked and the land restored to settlement and entry, the Secretary said:

> "The St. Paul and Sonix City Railroad Company state that the withdrawal of indemnity lands for their benefit was made under the provisions of the act of Congress approved March 3, 1857 (11 Stat., 195), and of the seventh section of the act of May 12, 1864 (13 Stat., 72), and that neither said section nor the act of March 3, 1857, is mentioned in nor repealed by the fourth section of the act of September 29, 1890 (26 Stat., 496).
>
> Upon examination it appears that neither the act of March 3, 1857, nor the seventh section of the act of May 12, 1864, directs the Secretary of the Interior to withdraw from market or entry the lands within the indemnity limits of the grant to said company. It appears that the indemnity withdrawal for the

benefit of this company was not revoked in 1887, when the company was cited to show cause, etc., because it was claimed in answer to said citation, as a reason why said revocation should not be made, that the 7th section of an act approved March 3, 1865 (13 Stat., 526), was a legislative withdrawal of the lands in the indemnity limits of their grant and consequently the land department had no power, in the absence of legislative action, to revoke the order of withdrawal made by direction of Congress.

The Department was in some doubt, by reason of the language of said section 7, as to the power to revoke the order. All doubt has since been removed by the passage of the act of September 29, 1890, *supra*, the 4th section of which repeals section 7 of the act of 1865, *supra*."

Section 4 of the act of September 29, 1890, above referred to is as follows, to wit:

"That section 5 of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four, and section 7 of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes,' approved March third, eighteen hundred and sixty-five, and also section five of an act entitled 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said States,'

approved July fourth, eighteen hundred and sixty-six, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of section four of an act approved June second, eighteen hundred and sixty-four, and entitled 'An act to amend an act entitled 'An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State,'' approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limits of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act of which the same is amendatory."

Secretaries Lamar, Vilas, and Noble treated it as a legislative withdrawal and did not attempt to revoke it for that reason. But, as held by Secretary Noble, *supra*, the statute making the withdrawal was repealed by the act of September 29, 1890.

What effect did this repeal of the statute have upon the withdrawal?

We insist its effect was to *put an end to the withdrawal the very moment it became a law without any action on the part of any officer or other person.*

The general doctrine is accurately stated in vol. 23, Am. and Eng. Enc. of Law, as follows:

> "A statute repealed by a later act of the same legislature is, in absence of provisions to the contrary, considered, as to its operative effect, as if it had never existed, except as to matters and transactions passed and closed."

Sedgwick on the Construction of Statutes and Constitutional Law, 2d edition, page 108, states as the correct rule the one laid down by Chief Justice Tindal in Kay *vs.* Goodwin, 4th Moone and Payne, 341, as follows:

> "The effect of a repealing statute I take to be to obliterate the statute to be repealed as completely from the records of Parliament as if it had never been passed; and that it must be considered as a law that had never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law."

Endlich on Interpretation of Statutes, section 478, thus states the rule:

> "As to all future matters, all steps yet to be taken the repealed statute upon which they are based is treated as utterly obliterated."

Again, in section 480, it is said:

> "The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If, at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone."

Maxwell on Interpretation of Statutes, page 377, quotes Lord Tenderden's decision in Surtees *vs.* Ellison, 9 B. & C., 750, as follows:

> "When an act expires or is repealed, it is considered, in absence of provisions to the contrary, as if it had never existed, except as to transactions passed and closed."

Potters Dwaris on Statutes and Constitution, Edition 1878, states the rule as follows:

> "When an act of Parliament is repealed it must be considered (except as to cases passed and closed) as if it had never existed" (page 160).

Again, the same author at page 155, says:

> "A repealing statute, is a total abrogation of the law repealed, but rights acquired, and which became perfect under the law before its repeal, are not affected by the repeal."

Southerland on Statutory Construction, page 137, lays down the rule thus:

> "A repeal will take effect from any subsequent statute which the legislature gives a clear expression of its will for that purpose."

In section 162, it is said:

> "The general rule is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transaction passed and closed, as though it never had existed."

This is followed in section 163 by the following statement:

> "Rights depending on the statute and still inchoate not perfected by final judgement or reduced to possession, are lost by repeal or expiration of the statute."

In the case of William H. McArdle, 7 Wall., 506, this court said:

> "The general rule, supported by the best elementary writers (Dwaris Stat., 538,) is, that when an act of the legislature is repealed, it must be considered, except as to transactions and matters passed and closed, as if it never existed."

This court has also held that the repeal of a statute giving a penalty, puts an end to all actions pending at the time of the passage of the repealing statute. Yeaton *vs.* The United States, 5 Cranch, 281; Schooner Rachel *vs.* The United States, 6 Cranch, 329; Norris *vs.* Crocker, 13 How., 429; U. S. *vs.* Passman, 4 Dall., 272.

Sedgewick, at page 111, says the same rule applies to all proceedings, whether civil or criminal, going on by virtue of a statute at the time of its repeal.

We are not aware of any decision of the Department, upon this question, as applied to this particular repealing statute.

But, in the case of Katharine Davis, decided August 9, 1900 (30 L. D., 220), involving a withdrawal made under the act of July 22, 1854, of lands claimed under Spanish or Mexican grants, the Department held that upon the final decision of the

Supreme Court of the United States rejecting the grant in controversy, the land was immediately opened to settlement and entry. We quote from said decision as follows:

> "While this appeal was pending the Department received your letter of January 11, 1900, conveying the information that the judgment of the Court of Private Land Claims rejecting this grant had become final. In said letter you refer to the cases of Katharine Davis and Clinton D. Hoover, pending before the Department upon appeals from the action of your office rejecting application to enter lands within the limits of said claim, and you submit for consideration the question 'whether the final judgment of the court *ipso facto* opened the lands to entry, or whether the formal act of restoration remains within the jurisdiction of that department of the executive having control of the public lands.' You state that the order reserving the lands emanated from the land department and express the opinion that before the lands reserved to satisfy the Algodones grant will become subject to entry, it will be necessary for the land department to revoke the order of reservation.
>
> The reservation provided for by the act of July 22, 1854, *supra*, did not depend for its efficiency upon the ministerial action of the land department in giving notice of the withdrawal, but it became immediately operative by force of the statute upon all lands within the ceded territory covered at the time by any Spanish or Mexican claims which originated prior to the treaty of cession, and the reservation of the lands continued until the final

> action on such claim, whether such action was by Congress under the act of July 22, 1854, or by the Court of Private Land Claims under the act of March 3, 1891, *supra*. * * *
>
> It therefore follows that on the final adjudication and rejection of said claim the lands embraced therein became at once opened to settlement and entry without any formal order on the part of the land department announcing the determination of the reservation."

This seems to be a parallel case. There was a legislative withdrawal, and although, as stated by the Commissioner, "the order reserving the lands emanated from the land department" and he expressed the opinion that before the lands would become subject to entry, it would be necessary for the land department to revoke its order of reservation, the Department dissented from this view, and held that "the reservation provided for by the act of July 22, 1854, *supra*, *did not depend for its efficiency upon the ministerial action of the land department in giving notice of the withdrawal, but it became immediately operative by force of the statute*" etc. And of course it followed logically that it was not at all necessary to revoke this unimportant ministerial action of the land department in giving notice of a statutory withdrawal, in order to restore the land to the public domain.

This must be the correct rule. Any other would put it in the power of the Department to thwart, postpone, or entirely defeat the purpose of Congress. If the efficiency of the action of Congress in legislation to put an end to a withdrawal made by

it, depended upon the Department giving notice of such legislation, it might be postponed eight years, or indefinitely, instead of eight months, as was the case in giving notice of the act of September 29, 1890. If the Department had refused to give the formal notice of the act of Congress repealing the withdrawal it had made by a previous act, would it be contended such refusal to act would wholly defeat the purpose of Congress and render the act nugatory? If not, then his action would neither give efficiency to, nor in anywise postpone or defeat, the immediate operation of the repealing statute.

No one can doubt the purpose of Congress in passing this repealing act. That body knew from a special message of the President, embodying a report to him of Secretary Vilas that he was powerless to revoke this statutory withdrawal and upon his recommendation and that of the President this act to put an end to the withdrawal was passed.

That it did immediately put an end to it just as effectively as if the act had said in so many words that "from and after the passage of this act all indemnity lands not embraced in approved selections shall be restored to settlement and entry," we have no doubt, and feel sure, that a careful consideration of the question, such as it will receive by this court, will result in such holding.

This being the correct view, *there was no withdrawal whatever* in force when Gertgens made his settlement on the land April 15, 1891, *and the land was subject to his settlement*, no vested rights having been acquired by the railroad company by

its illegal selection of 1885, which was subsequently abandoned and cancelled. (See Exhibit "H"–1 Record, p. 100.)

To thus hold would disturb no rights of the railroad company, for, as held by both this court and the Department, the company acquired no vested right in any tract of land within its indemnity limits until its selection was approved by the Secretary. Upon this point this court, in the late case of Oregon & California Railroad Company *vs.* United States, No. 186, October term, 1902, speaking through Mr. Justice Harlan, said:

> "As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."

Again, in the same decision, after referring to and quoting from former decisions of the court, the true doctrine is thus stated:

> "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, *no right* of the railroad company *attaches or can attach* to specific lands within indemnity limits until there is a selection *under the direction, or with the approval of* the Secretary."

Secretary Lamar, in the case of the Atlantic & Pacific Railroad Co. (6 L. D., 84), after revoking

the indemnity withdrawal made for the benefit of that company, thus defined his purpose, and the effect of said decision:

> "I therefore direct that all lands under withdrawals heretofore made and held for indemnity purposes under the grant to the Atlantic & Pacific Railroad Company *be restored* to the public domain and *opened to settlement* under the general land laws, except such lands as may be covered by *approved selections*."

Again, in the special circular of September 6, 1887 (6 L. D., 131), which provided the machinery for disposing of the lands theretofore embraced in indemnity withdrawals, it is said:

> "The order of revocation and restoration includes all the lands within the indemnity limits of the grants for the roads hereinafter mentioned (see Appendix A), except such lands as may be covered by *approved* selections, by which is meant selections which have been *approved* by the Commissioner of this office and the *Secretary of the Interior*."

The selections covering the land in controversy not only were *not approved*, but, as the record shows, no valid base was assigned for the selections of the company, and on August 15, 1891, it, by the filing of a new list, in the language of the Commissioner in his letter of July 17, 1896 (Record, p. 100), "giving a different and entirely new basis, the company abandoned its original selection, and it must stand or fall by the substituted list."

It is thus shown that the selection which was in existence at the date of the passage of the act of September 29, 1890, was illegal, and, in our opinion, wholly void for any purpose, its illegality being recognized by the company and abandoned in August following.

Certainly no injustice could be done the company by holding that the act of 1890, repealing the statutory withdrawal, *ipso facto*, restored the land in controversy to settlement.

The Secretary's Order of May 22, 1891.

We have seen that the withdrawal made by the act of 1865 was revoked by the repealing act of 1890, and was without any legal force or vitality after that date, and hence no bar to Gertgens' settlement.

On May 22, 1891, the Secretary, to use the language used by Mr. Justice Field in reference to the statutory withdrawal in favor of the Northern Pacific Railroad Company in delivering the opinion of this court in the case of St. Paul and Pacific Railroad Company *vs.* Northern Pacific Railroad Company, 139 U. S., 1, formally announced the revocation of the withdrawal by giving publicity to what the law itself declared.

If any obstacle existed to the attaching of settlement rights to the lands embraced within the limits of this indemnity withdrawal prior to that date, it was entirely removed by this order of the Department. This the land department has uniformly held ever since that date.

In support of this statement we call attention, among others, to the following cases:

> St. Paul, Minneapolis and Manitoba Railroad Company *vs.* Hastings and Dakota Railroad Company, 13 L. D., 440, at bottom of page 447.

In Thuenie *vs.* St. Paul, Minneapolis and Manitoba Railroad Company, 14 L. D., 545, Secretary Noble said:

> "This withdrawal was not revoked until May 22, 1891, under the authority of section 4 of the act of Congress approved September 29, 1890," *supra.* * * *

Again he said:

> "The language of section 6 here referred to is identical with section 3 of the act of March 3, 1865, before quoted, and while in the Wisconsin Central case the withdrawal was but an executive order, in the present case it was directed by the act making the grant, and required congressional action before the withdrawal could be revoked."

To the same effect is the case of Erickson *vs.* The St. Paul, Minneapolis and Manitoba Ry. Co., 19 L. D., 423; St. Paul, Minneapolis and Manitoba Ry. Co. *vs.* Hagen, 20 L. D., 249, and St. Paul, Minneapolis and Manitoba Ry. Co. *vs.* Rowan *et al.*, 22 L. D., 610.

In the Rowan case Secretary Smith not only held the withdrawal was revoked May 22, 1891, but that

the selection list (No. 10), which embraced the land in this case, was no bar to the allowance of the homestead application of Rowan and others, and directed that the land be disposed of without reference to them.

In the case of Vandeburgh *vs.* Hastings and Dakota Ry. Co. *et al.*, 26 L. D., 390, decided by Secretary Bliss, referring to the Departmental decision in 13 L. D., 440, involving the same withdrawal, it was said:

> "Prior to the date of said decision, to wit, on May 22, 1891 (12 L. D., 541), in accordance with the provisions of the 4th section of the act of September 29, 1890, the indemnity withdrawal formerly made on account of this grant was revoked and the lands restored to the public domain."

In the case of Wolke *vs.* The St. Paul and Northern Pacific R. R. Co., 27 L. D., 404, Secretary Bliss said:

> "The records of your office show that this land was withdrawn from settlement and entry on July 10, 1865. This withdrawal was revoked on May 22, 1891."

Again, further on in the same decision, he said:

> "The order of withdrawal was revoked on May 22, 1891, *and from that date* until February 12, 1892, the time when the company selected the land, said tract was subject to *entry and settlement*.

> Therefore, if Wolke was a qualified homestead settler upon the land on May 22, 1891, his right to the same is superior to that of the railroad company."

See also—

Hastings & Dakota Ry. Co. *vs.* Pattis, 30 L. D., 106.

Gorden *vs.* St. Paul, Minneapolis & Manitoba Ry. Co., 24 L. D., 434, and Hastings & Dakota Ry. Co., 18 L. D., 511, decided by Secretary Smith.

We are quite sure no decision of the Department can be found, made subsequent to May 22, 1891, holding the contrary.

This being the case, there can be no question but that, if Gertgens' settlement rights did not attach on April 15, 1891, when he settled, by virtue of the revocation of the withdrawal made by the repealing act of 1890, they did attach on May 22, 1891, upon this Departmental revocation of that date, he being at that time a qualified settler upon the land.

We insist, therefore, that the withdrawal was made by *statute* and was revoked and the land *ipso facto* restored to the public domain by the *unconditional repeal* of the statute making it, and as the railroad company had acquired no vested rights by virtue of its selection, it was restored, *eo instanti* to both settlement and entry, without any action of the Department.

But, in any view of the case, the Secretary's order of May 22, 1891, formally announcing the

repeal of the statute making the withdrawal, effectually obliterated the executive action of May, 1869, announcing the statutory withdrawal of 1865, if it ever had any effect. And, under the decision of the Department in the Rowan case, *supra*, the land was then subject to Gertgens' *entry* as it had been to his settlement since September 29, 1890, or at least since May 22, 1891, and his application made in 1895, based upon his settlement in 1891, should have been allowed.

The Effect of the Decision of May 22, 1891.

Having shown conclusively, by the uniform ruling of the Department, that the decision of May 22, 1891, *took effect* from its date, the inquiry which would logically arise is, *what was its effect upon the status of the land?*

This question also has been fully settled by Departmental ruling, as well as by the uniform practice in all similar cases.

The last paragraph of the decision of the Secretary of May 22, 1891, *supra*, and which contains the direction to the Commissioner for the disposal of the lands involved is as follows:

> "I, therefore, direct that after giving the usual notice, all lands under withdrawals heretofore made and held for indemnity purposes under the grants to said roads be restored to the public domain and opened to settlement and entry in accordance with rules heretofore established in similar cases." (12 L. D., 541, bottom p. 544. Record, p. 93.)

What are the "rules heretofore established in similar cases," in accordance with which these lands were to be disposed of? Again, we are not left in doubt, as the Department has considered and settled this question also.

In the case of O'Brien *vs.* Chamberlin (29 L. D., 218), this precise question arose and was set at rest by the decision of Acting Secretary Ryan, who decided as follows:

> "In the answer filed to the appeal it is urged that the circular of September 6, 1887, *supra*, had no application to the lands within the limits of the grant under consideration, the same being included in a legislative withdrawal at the time of the issue of said circular, and that it was not incumbent upon Annie O'Brien to present her application until after the formal cancellation of the railroad selection, October 23, 1896.
>
> While it is true that this land was included within a legislative withdrawal at the time of the issue of the circular of September 6, 1887, yet such withdrawal was subsequently revoked by Departmental order May 22, 1891 (12 L. D., 541), and by the terms of that order the lands were restored to settlement and entry 'in accordance with the rules heretofore established in similar cases.' The rules 'established in similar cases' must have had reference to the circular of September 6, 1887, being the special circular governing the restoration of railroad indemnity lands. By the terms of said circular it was provided as follows:
>
> As to lands covered by unapproved selections, applications to make filings and entries

thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers." * * *

This "special circular governing the restoration of railroad indemnity lands," may be found in (6 L. D., p. 131), and is as follows:

Restoration of Indemnity Lands.

Circular.

WASHINGTON, D. C., September 6, 1887.

The Hon. Secretary of the Interior having revoked the indemnity withdrawals heretofore ordered for the benefit of certain railroad and wagon road companies and directed that all lands embraced therein be restored to the public domain and opened to settlement under the general land laws, the following is submitted in answer to the numerous inquiries relative thereto:

The order of revocation and restoration includes all the lands within the indemnity limits of the grants for the roads hereinafter mentioned (see Appendix A), except such lands as may be covered by approved selections, by which is meant selections which have been examined and approved by the Commissioner of this office and the Secretary of the Interior. It is provided, however, that the order of restoration shall not affect rights acquired

by grantees within the primary or granted limits of any other congressional grant.

As to lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers.

Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.

Should the company fail to respond or show cause before the district land officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same which will be determined by the register and receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the register and receiver to this office in the class of cases above provided for, they will be disposed of without delay, and if the decision should be in

favor of the company, and no appeal be taken, the land will be certified to the Secretary of the Interior for approval for patent without requiring further action on the part of the company except the payment of the required fees. If the decision should be adverse to the company, and no appeal be taken, the selection will be cancelled and the filing or entry allowed subject to compliance with law.

Lands which have not been selected will be subject to settlement and entry as other public lands, and notice to the company will not be required.

The Secretary's orders revoking said indemnity withdrawals take effect from the date of the issue thereof (see Appendix A), so as to open the lands embraced therein to settlement, but filings and entries of said lands will not be received until notice of the restoration shall have been given by a public advertisement for a period of thirty days, it being the intention of the order of revocation that as against actual settlement thereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights, both of the company and of the settlers, attaching prior to the issue of the Secretary's order, will be determined by the facts in each case.

The necessary instructions for the restoration of the lands affected by the Secretary's orders have been issued to the registers and receivers for the land districts in which the lands are situated (see Appendix B), to whom application to enter, or for any further information, should be made.

The restoration as ordered is to entry under the general land laws relating to settlement. Private cash entries of the restored lands will not be allowed.

S. M. STOCKSLAGER,
Acting Commissioner.

Approved:

H. L. MULDROW,
Acting Secretary.

It will be observed, the second paragraph of this circular provides as to lands covered by approved selections as follows:

> "The order of revocation and restoration includes all the lands within the indemnity limits of the grants for the roads hereinafter mentioned (see Appendix A), except such lands as may be covered by *approved* selections, by which is meant selections which have been examined and approved by the Commissioner of this office and the Secretary of the Interior." * * *

This is followed by the machinery for attacking unapproved selections, by persons applying to make filings and entries.

Then follows the emphatic statement, that the order of restoration *took effect from the date of the issue thereof*, so as to open the lands embraced therein *to settlement*, but *filings and entries* should not be received until after the thirty days' period of publication, as follows:

> "The Secretary's orders revoking said indemnity withdrawals take effect from the date of the issue thereof (see Appendix A), so as to open the lands embraced therein to settlement but filings and entries of said lands will not be received until notice of the restoration shall have been given by a public advertisement for a period of thirty days, it being the intention of the order of revocation that as against actual settlement, thereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights, both of the company and of settlers, attaching prior to the issue of the Secretary's order, will be determined by the facts in each case."

Nothing could be plainer or clearer than this circular, issued under the administration of Secretary Lamar, for the disposal of the lands included within the limits of the indemnity withdrawals revoked by him, embracing all, or nearly all, of the withdrawals which were not legislative.

In its scope it covers the three classes of cases:

(1) Approved railroad selections.

(2) Unapproved selections, and—

(3) Lands not selected.

The first, approved selections, are, of course, excepted from the operation of the order of restoration.

The second, or unapproved selections, were *restored to settlement, but not to entry*, until after thirty days' notice.

The rights, both of the company and settlers, attaching prior to the issue of the Secretary's order were to be determined by the facts in each case.

This special circular, so full and complete, has been followed ever since its date, and to-day, governs the land department in the disposal of all lands restored to the public domain, which were heretofore covered by railroad grants.

That Commissioner Stone understood the Secretary's order and direction, contained in his decision of May 22, 1891, required him to follow this circular in the disposal of the lands involved is shown by his letter of May 28, 1891, promulgating that decision.

After stating that he is acting under the instructions contained in that decision, and requiring thirty days' notice to restore the lands to *entry*, he says:

> "In the disposition of application for lands embraced in pending selections by said company, you will be governed by the rules established for the disposition of all applications under the orders of August, 1887, viz:"

Then follows all that part of said special circular of September 6, 1887, *supra*, governing the disposal of lands embraced in unapproved selections.

This leaves no doubt, so far as the land department is concerned, that the same doctrine was applied, and the same rules governed the disposition of the lands embraced in unapproved selections

affected by the order of May 22, 1891, as were applied to, and governed in, the disposition of similar lands embraced in indemnity withdrawals revoked by Secretary Lamar, in the lands restored in 1887.

And in point of fact, the land involved in this action, was disposed of precisely in accordance with said special circular.

The Decision of the Supreme Court of Minnesota.

In the face of this long and unbroken line of decisions of the Department, covering a period of more than twelve years, and including the administrations of Secretaries Lamar, Noble, Smith, Bliss, and Hitchcock, construing and applying this order of revocation of May 22, 1891, as *effective from its date*, the Supreme Court of Minnesota in the case at bar held "it did not of itself, affect the previous order of withdrawal."

The reason of the court for so holding is thus stated:

> "Counsel for defendant are in error when asserting that the Secretary's action revoked the order. On May 28, of the same year, the Commissioner directed the register and receiver of the St. Cloud District, in which this land was situated, to restore to the public domain and open to settlement and entry all lands in the district theretofore withdrawn, situated within the indemnity limits of the grant "not

> embraced in the selections heretofore made or applied for by said railroad company." This order, as will be seen, expressly reserved from its operation all lands which had been selected or applied for by the company, and among them was this particular tract of land. It expressly directed that there be open to settlement and entry all indemnity lands not selected or applied for, but in no manner did it revoke the previous order of withdrawal, in so far as that order and the subsequent selection affected and withdrew from the public domain the 160 acres in dispute."

If it be conceded that the intention of the Commissioner was to continue the withdrawal, or that the language used by him could be construed as having such effect, *it was totally beyond his power to do so.* For whether it be held the repealing act of September 29, 1890, put an end to the withdrawal or not, it certainly took away the power to make any further or additional executive withdrawals on account of said grant.

Neither could the Commissioner in any wise limit the full force and effect of the decision of the Secretary revoking the indemnity withdrawal and ordering that the lands embraced therein "be restored to the public domain and opened to settlement and entry in accordance with the rules heretofore established in similar cases."

We are satisfied he did not intend to limit its effect, and we think the court is in error in holding the language used, taken in connection with the

order, and the subsequent action after the selections were cancelled, is open to any such construction.

While the letter of Commissioner Stone of May 28, promulgating the Secretary's decision of May 22, 1891, might have been couched in language which would have made his purpose clearer, yet a careful analysis of the whole letter leaves no doubt whatever as to its meaning, and shows that it is in entire harmony with the instructions of the Secretary. It will be observed that in the first sentence he says:

> "*Under instructions from the honorable Secretary of the Interior dated May* 22, 1891, you are directed," &c.

This makes it clear he intended to do nothing except to carry out the instructions of the Secretary.

But the Supreme Court of Minnesota held that because he said:

> "You are directed to restore to the public domain and open *to settlement and entry* all lands heretofore withdrawn in your district within the indemnity limits of the grant for the St. Paul, Minneapolis & Manitoba Railway Company and *not embraced in selections heretofore made or applied for by said company.*"

He intended to, and did, continue the railroad withdrawal, or, at any rate entirely except from the operation of the order of revocation and restoration, *all* lands covered by selections or applications to select.

Now, it is too clear for doubt that strictly speaking this language is accurate, and is in accordance with the Secretary's order for the restoration to the public domain and opening to *settlement and entry* of the lands "in accordance with the rules heretofore established in similar cases."

These rules did not open the lands embraced in *unapproved selections* (as were those in this case) to *entry* at the date of the revocation of the withdrawal; but, on the contrary, thirty days' notice was required to be given by the local officers before the land was subject to *filings or entries; but not so as to settlement.* And hence, when Commissioner Stone referred to lands open to *both settlement and entry*, he very properly excluded those embraced in unapproved selections and applications to select.

If there was any room for doubt, the subsequent paragraphs of his letter would remove it.

In a subsequent paragraph he directs the local officers to fix a date not less than thirty days and give public notice "when the lands will *be open to entry.*"

He still further makes the whole matter so perfectly clear, that it would seem no one could have any doubt, by the following directions:

> "In the disposition of applications for lands *embraced in pending selections* by said company, you will be governed by the rules established for the disposition of applications *under the orders of August*, 1887."

He then proceeds to set out some of the provisions of that special circular.

As we have already pointed out and quoted from that circular, it was stated in so many words that from its date all the lands embraced in the indemnity withdrawals, *except* "such lands as were covered by *approved selections*," were restored to the public domain and opened *to settlement from the date of the order*, but *not restored to entry* until after thirty days' notice should be given.

This is the "special circular" which the Department held in the Chamberlin case, *supra*. Secretary Noble meant in his order of May 22, 1891, and Commissioner Stone frees the question from all doubt by directing the local officers to dispose of the lands covered by unapproved selections in accordance with that circular; and, as before remarked, they were disposed of in accordance therewith.

As before stated, if Commissioner Stone had intended to continue the railroad withdrawal, as the Supreme Court of Minnesota held he did, and had so directed in unmistakable terms, his action would have been *ultra vires*.

That court cited numerous authorities tending to show the power of the executive department to make withdrawals of the public lands. No one questions that power when exercised in pursuance of law. But the Congress has the exclusive power to dispose of the public lands, and neither the Commissioner nor the Secretary have any power

whatever to either withdraw, or dispose of the public lands, *except as authorized by Congress*

Northern Pacific Railroad Co. *vs.* Davis (19 L. D., 87); and—

Northern Pacific Ry. Co. *vs.* Ayres (24 L. D., 40), quoted approvingly in S. P. R. R. Co. *vs.* Bell, (183 U. S., 675).

The old doctrine that any withdrawal made by the executive department, whether rightfully or wrongfully made, was a bar to the acquisition of settlement rights so long as it continued, received its first rude shock in the Department, in the decision of Secretary Vilas, in the case of Northern Pacific R. R. Co. *vs.* Miller (7 L. D., 100), wherein he held that "the statutory withdrawal once exercised was exhausted and could not be repeated." And that, as a consequence, "a tract of land not within the limits of the statutory withdrawal on general route of 1870, but falling within the indemnity limits on definite location, was free from the *operation of the grant, and subject to appropriation under the general land laws.*"

That decision has been followed in the adjustment of that grant ever since it was made, although strenuous efforts were made by the railroad company to have it reversed on motion for review and rehearing.

This decision was based upon the ground that there was an implied prohibition of this withdrawal and hence, being in violation of law, did not prevent the acquisition of settlement rights.

So, in the case at bar. If the statutory withdrawal made by virtue of the 7th section of the act of March 3, 1865, once exercised was exhausted, and could not be repeated, how could the Commissioner, after its revocation by the 4th section of the act of September 29, 1890, and the order of the Secretary of May 22, 1891, repeat, renew, continue, or extend this statutory withdrawal?

The argument of the Supreme Court of Minnesota in reference to the executive power of the Secretary to make withdrawals, whether sound or not, is totally inapplicable to the case. There was never any pretense that the withdrawal order of 1869 was made under the "plenary power" of the Secretary, but, on the contrary, as heretofore shown, *strictly in pursuance of the statutory mandate.*

If it had been considered by the land department that it was an executive withdrawal, as contradistinguished from a legislative withdrawal, it would have been revoked in 1887 along with the other revocations.

And, it might be added, this view as to the power of the Secretary to make withdrawals was pressed upon the court in the case of Hewitt *vs.* Shultz, *supra*, which case was reviewed and followed by an unanimous court in Southern Pacific Railroad Co. *vs.* Bell (183 U. S., 675), and was followed in the still later case of Nelson *vs.* Northern Pacific Railway Co. (188 U. S., 108).

This court, in the case of Hewitt *vs.* Shultz, 180 U. S., 139, and Nelson *vs.* Northern Pacific Ry. Co.,

188 U. S., 108, approved and followed Secretary Vilas' decision in the Miller case, *supra*.

In the case of Oregon & California Railroad Co. *vs.* The United States, No. 186, October term, 1902, decided by Mr. Justice Harlan April 6, 1903, this court go a step farther and hold that a withdrawal, which though not *prohibited* by Congress, if unauthorized, is no bar to settlement. In that case the court said:

> "We need not discuss here the question of the power of the Secretary of the Interior to revoke an order of withdrawal once legally made and notice thereof given at the local land office. It is sufficient to say that the railroad company did not, by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered section within those limits; nor did that order prevent the *bona fide* occupancy by settlers within such limits up to the time of the approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits."

In the face of these authorities, to say that in a case where, upon the recommendation of the Secretary of the Interior and the President of the United States, Congress repealed the statute which made the statutory withdrawal for the express purpose of putting an end to it, and in defiance of the order of the Secretary of May 22, 1891, that one of the Secretary's subordinate officers could continue and keep in force that withdrawal, with due

deference to the Supreme Court of Minnesota, seems to us to border on the ridiculous.

The Railroad Selections.

The Supreme Court of Minnesota also held that the Commissioner of the General Land Office, in his decision of October 23, 1896, finally cancelling the selection (list No. 10, St. Cloud, Minn.), which covered the land in controversy, and restoring the lands to the public domain, "expressly excluded from its operation," this and other lands which had previously been applied for, and in the language of the court, "as to it the original order of withdrawal remained in full force."

The language which is given this most extraordinary construction, which never occurred to the land department, but was first announced by the Minnesota court, is as follows:

> "The said decision is accordingly declared final and the *tracts in said list cancelled on the records of the office.* You will so note on your record.
>
> A large portion of these lands have been applied for by parties claiming them under the settlement laws, and by John Ireland, who claims under act of March 3, 1887 (25 Stat., 556), as a purchaser from the St. Paul, Minneapolis and Manitoba Ry. Co.
>
> No disposal will be made of these lands until the above claims are adjudicated by this office." (Record, p. 101.)

What is the meaning of this plain and simple instruction of the Commissioner to the local officers? It is merely that, *having cancelled the selection* as to all the tracts embraced in the list, he informs them that as to a large portion of the tracts their are two or more claims on file, and that they will make no (other) disposition of the lands until these claims are adjudicated by him. This is perfectly evident, as on the very next day, October 24, 1896, he directed them to order a hearing on Ireland's application to purchase, and added:

> "You will accordingly advise him that he may now come forward (the railroad claim having been disposed of), and make publication, *being careful* that in addition to the published notice, all parties now known, or who may become known before the closing of the case before you, to be adverse claimants to any of said lands, are *given special notice* thereof."

Also—

> "The tracts applied for are all within a few miles of each other and are so great a distance from your office that the proof should be made in their vicinity to enable the adverse claimants to appear and make such showing as they may desire without unnecessary expense," etc. (Record, p. 104.)

In the case of the Hastings and Dakota Railway Co. (18 L. D., 511), Secretary Smith, referring to the time of taking effect of the decision cancelling that company's selections, said:

"The point made by Commissioner Stone that, though the Departmental decision was made on October 23, 1891, it did not become effective until the former selections, which covered said lands, were actually cancelled on the records of the local office, which was some time in November, 1891, does not commend itself to me, but seems to be in entire discord with well-settled rules and numerous decisions of this Department. Your predecessor states that though the decision was signed October 23, it was not promulgated until the 30th, was not received by him until November 1, and not mailed to the local office until November 21, 1891.

By a long line of decisions it is settled, that cancellation takes effect as of the date when the decision is rendered, the entry of the order of cancellation on the records being a mere ministerial act of the officers, which, when made, takes effect by relation as of the date of the judgment. (Pomeroy *vs.* Wright, 2 L. D., 164; Anderson *vs.* Northern Pacific R. R. Co., 7 L. D., 163; Dahlstrom *vs* St. Paul, Minneapolis and Manitoba Ry. Co., 12 L. D., 59; Coder *vs.* Lotridge, Id., 643; Lough *vs.* Ogden, 17 L. D., 171; Perrot *vs.* Connick, 13 L. D., 598.) The judgment of cancellation in this case being rendered on October 23, the lands were properly subject to the selection made by the Hastings and Dakota Railway Company, on the 29th, or six days thereafter."

If the railroad claim, withdrawal, selection, and every claim of any character which it, or any one claiming under it, could possibly urge, had not been fully and completely adjudicated and disposed

of, the Department would have had no power whatever to consider Ireland's claim as a purchaser under the act of March 3, 1887. His claim rested solely upon the ground that he had purchased from the company the land, which, for "any reason was *excepted from the operation of the grant to the Company.*" (5th sec., act March 3, 1887.)

It follows the land department must have held the land was excepted from the operation of the grant, or the claim could not have been considered.

This is also made clear by the letter of October 24, 1896, *supra*, which ordered the hearing. After stating that the local officers on March 20, 1896, had transmitted Ireland's application to purchase this and other tracts, which was refused by them, and instructions asked, the letter proceeds:

> "By letters of July 17 and July 18 last the lists of the company containing these lands, 10 and 11 Fergus Falls, and No. 7 of your office, were held for cancellation, and on October 23, 1896, *were cancelled*, no appeal having been taken. Therefore, there is no objection to the allowance of the publication of Ireland to make proof of his purchase after usual notice," etc.

This simply means that, as the entire railroad claim is wiped out, applications to purchase under the act of March 3, 1887, may be considered. Prior to that date Ireland's application was premature, and might have been rejected for that reason.

But, if these letters left any remaining doubt that the selection was completely disposed of and the

lands opened to entry October 23, 1896, the decision of the Commissioner on the contest between Ireland and these settlers, in which a hearing was ordered, bearing date February 3, 1898 (Record, p. 52), and in which the land was awarded to Ireland, would entirely remove it.

In that decision the Commissioner, referring to these selections, said:

> "These selections were pending before this office on October 23, 1896, when they were cancelled and the lands restored to settlement and entry, subject to such rights as might have been acquired under the act of March 3, 1887."

Again, further on in the same decision, he said:

> "When these selections were cancelled, the lands were restored to settlement and entry by any qualified applicant under the homestead law, subject to any existing right of purchase under the 5th section of the act of March 3, 1887."

He then proceeded to hold that settlers who had contracts under Ireland's first agreement with the company, were *bona fide* purchasers under said act but that they might make homestead entries if they so preferred, thus holding the land was subject to homestead entry on and after October 23, 1896.

That no attempt was made by the Department to renew or extend the withdrawal of these lands, is still further and conclusively shown, as before

stated, by the consideration that Ireland had no right to present his claim under section 5 of the act of March 3, 1887, until the railroad grant had been finally adjusted and it had been finally determined that the land claimed was "excepted from the operation of the grant."

Northern Pacific Ry. Co. *vs.* Biggs *et al.* (31 L. D., 254), and—
Nicholas Cochens (11 L. D., 629).

Such adjustment and extinguishment of the railroad title was declared by the Commissioner's final decision of October 23, 1896, when list ten was finally cancelled and the land thus excluded from the grant.

How then could, or why would, the land department in the same decision, as claimed by the Supreme Court of Minnesota, *perpetuate* the former withdrawal in aid of the extinguished railroad title.

Settler's Right to Make Entry not Affected by Selections.

The theory that this illegal selection was in the way of settlers was an after thought, and never occurred to Ireland's counsel, who joined in the stipulation of facts before the local officers. It was there stipulated only, that these settlers knew when they settled that the land was "then under a *withdrawal* for railroad purposes under claim by the railway company as indemnity lands." No suggestion was made as to a railroad *selection*. It

had been cancelled October 23, 1896, and this stipulation was entered into January 21, 1897. (Record, p. 39.)

Again, in the case of Ashelman *vs.* Northern Pacific R. R. Co. (23 L. D., 513), the Department held:

> "If the company's selection was invalid, Ashelman was denied a right. (He was an applicant for homestead entry) by the action of the local officers in rejecting his application for conflict therewith, and he should be recognized in his right, if any be gained under his application, from the date of its presentation. Should the company fail to appeal from your decision Ashelman will be accorded rights under his application as of the date of its presentation; and in the event that the company appeals, its rights in the matter will depend upon the legality of its selection."

This is a parallel case. The Commissioner held the company's selection of the land in controversy to be illegal and held it for cancellation, from which holding the company failed to appeal and the decision became final. What then was his duty under the Ashleman decision? Evidently to allow Gertgens' application as of the date of its presentation, November 27, 1895.

In the Rowan case, *supra*, involving this identical list, the Department held the withdrawal was revoked May 22, 1891, and the selection was illegal, and that the land should be disposed of to homestead claimants without reference to the withdrawal or selection.

Gertgens attacked the railroad selection, and appealed from the decision rejecting his application for conflict therewith, and under the doctrine enunciated in the Ashelman case, approvingly quoted by Secretary Hitchcock in the late case of Falje *vs.* Moe (28 L. D., 371), his application should have been allowed by the Commissioner as of the date of its presentation, the selection having been held to be illegal.

The Cunningham Case.

But, notwithstanding the withdrawal and the railroad selection, we insist that, under the doctrine enunciated by this court in the case of Lake Superior Ship Canal Co. *vs.* Cunningham (155 U. S., 354), decided by Mr. Justice Brewer December 10, 1894, Gertgens' rights as a *bona fide* settler attached at the date of his settlement.

In that case it was held that, although a settler knew the land settled upon by him was covered by a railroad or canal grant, and withdrawal for its benefit, and that the land had been actually certified to the State under such grant, he could initiate a *bona fide* homestead claim upon such land in anticipation of forfeiture of said grant or grants.

The direct question was presented to the court whether such settler was a *bona fide* homestead settler within the meaning of the act of March 2, 1889, which act provides that the confirmation declared should not extend to any tracts "upon which there were *bona fide* pre-emption or home-

stead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed."

The court answered it in the affirmative, which opinion was based upon the following reasoning:

> "It does not appear that he knew the exact condition of the outstanding claims. If he did, he knew that this railroad grant had been outstanding thirty-two years; that the land was to be restored to the Government if the road was not completed within ten years, and that twenty-two years had passed since the time fixed by Congress for the completion of the road, and nothing had been done. His expectation was (and under the circumstances not an unreasonable one) that Congress would at some near time interfere to remove all this outstanding claim. Under these circumstances, and in expectation of such removal, he enters upon the land. Can it be said that his entry and occupation was with a view of depriving anybody of title, or that it was, as against the company, a wrongful entry? If the construction contended for were accepted, it would exclude from the benefit of the act any settlers upon these lands who knew that the land he entered upon was within the railroad grant."

In the case at bar we have a much stronger case. If Gertgens "knew the exact condition of the outstanding claim," he knew that this railroad grant had been outstanding thirty-four years; that in 1865 the grant was increased and all the lands

embraced in the act were withdrawn by statute; that the company made indemnity selections in 1885, as admitted by it, of 200,000 acres in excess of its losses (letter of Secretary Smith, Record, p. 95); that said selections were upon their face illegal, no base having been assigned, as required by the regulations of the Department (Commissioner's decision July 10, 1896, Record, p. 98); that the withdrawal would have been revoked in 1887 but for lack of power in the Secretary to revoke it, it having been made by statute; that this fact was reported to the President of the United States by Secretary Lamar in his public annual report for the year 1887; that on April 3, 1888, Secretary Vilas, in a communication to the President, set forth the same fact and recommended the repeal of this statutory withdrawal, which letter was transmitted to Congress, and is Public Executive Document 246, 50th Congress, 1st Session; that September 29, 1890, in accordance with such recommendation, Congress did pass an act repealing said statutory withdrawal. All of these facts were public property April 15, 1891, when he made his settlement and established his residence on the land, anticipating no doubt but that he would be permitted to obtain title to it, his good faith being shown by his placing $1,200 worth of improvements upon the land and breaking and cultivating 110 acres of it. It follows that it was just as well known in April, 1891, when Gertgens made his settlement, that the railroad company had no valid claim to the land as

it was, October 23, 1896, when its selections were finally cancelled.

While living upon the land, cultivating and improving it, and earning the land by such residence and cultivation, he learned something of the devious ways of railroad companies in the land department, in reference to their land grants. He learned that on the 22d day of May, 1891, the Secretary formally gave notice of the repeal of the statutory withdrawal; that on the 28th day of May, 1891, the Commissioner promulgated that order of the Secretary; that on August 15, 1891, said railroad company withdrew its illegal specification of losses, abandoned its selection, and substituted as a base, lands lost on the St. Vincent Extension, which this court (St. Paul & Pacific Railroad Company *vs.* Northern Pacific Railroad Company, 139 U. S., 1.) had previously (March 2, 1891) held to be a separate and different grant; that notwithstanding these facts, on application of the company, the Secretary suspended all action upon these excess lists until he should be further advised (Record, p. 95); that on October 1, 1895, a year and a half thereafter, the Secretary revoked his former order of suspension, and directed the Commissioner to proceed with the adjustment of the grant under the direction given in (13 L. D., 353) on June 10, 1891; that, notwithstanding this peremptory order of the Secretary to proceed with the adjustment of the grant under his directions of more than four years before, the Commissioner, on January 13, 1896, more than three months there-

after, instead of proceeding as directed, called upon the railroad company to show cause why the *suspension of* October last should not be removed, blandly remarking that it was a matter of importance to settlers and homestead applicants, and demanded immediate attention (Record, p. 97); that, although it was a matter "requiring immediate attention," nothing further was done until July 17, 1896, six months thereafter, when he held the selection for cancellation subject to appeal within 60 days; that the company after securing suspension from 1891 to 1896, a period of five years, acquiesced in the cancellation of its lists and declined to appeal; that not until October 23, 1896, were these admittedly illegal selections finally cancelled, and now he is met with the astounding proposition that they were never entirely cancelled, but that in the order of cancellation the original order of withdrawal, at least as to all the lands claimed by Ireland, including this land, was continued in force, and that as a consequence he never acquired even sufficient right to the land to question the title finally awarded to Ireland by the land department.

Such being the undisputed record facts, why, we ask, did not Gertgens become a *bona fide* homestead settler upon this land prior to the cancellation of the railroad selection, or the publication of notice by the Secretary, of the repeal of the statutory withdrawal, given by him May 22, 1891, just as Cunningham was held to be. We insist he did become such *bona fide* settler April 15, 1891,

and so continued thereafter, and as such acquired a vested right to the land.

Ireland Was Not a Bona Fide Purchaser.

Having established the proposition that Gertgens' settlement rights attached to the land April 15, 1891, the date of his settlement, and that his application to enter filed November 27, 1895, should have been allowed, we now proceed to a discussion of the question whether Ireland was a *bona fide* purchaser from the railroad company within the meaning of the 5th section, act of March 3, 1887. As heretofore stated, the trial court found for the defendant, plaintiff in error, on this point and excluded the evidence given by Ireland in the land department, in support of his application to purchase. But the Supreme Court of Minnesota took a different view and held that he brought himself within the terms of that statute.

Section 5, of the Act of March 3, 1887, under which Ireland was permitted to purchase the land, is as follows:

> "That where any said company have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from

the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

In his application to purchase 22,560.44 acres of land under the said 5th section (Record, p 16), Ireland based his right upon two contracts with the railroad company, one dated July 17, 1880, and the other March 30, 1883. A copy of the contract of July 17, 1880, may be found at page 19 of the Record, and is in words and figures as follows, to wit:

Contract of July 17, 1880.

"This agreement between the St. Paul, Minneapolis and Manitoba Railway Company, party of the first part, and the Right Reverend John Ireland, of St. Paul, Minnesota, party of the second part, witnesseth: That the party of the first part in consideration of the premises hereinafter set forth has given and does hereby give to the party of the second part until the 31st day of December, 1881, the sole and exclusive right and authority to place settlers upon and of making sales or agreements of sale to parties desiring to settle upon or purchase the same all those tracts and parcels of land situate in the counties of Big Stone and Traverse in the State of Minnesota to which said party of the first part is or may be entitled by virtue of the land grants to said State for its benefit, of March 3, 1857, and March 3, 1865, which said lands are included within the indemnity limits so called of the land grant belonging to the main line of said company's railway in the counties above named, and which lands are particularly described in the schedule heretofore attached, it is understood by the parties hereto that the party of the first part has already selected and applied for said lands as inuring to is under said land grants and that such applications are now pending before the Department of the Interior and this agreement is entered into subject to the acquiring of said lands by the party of the first part of its said land grant. It is further agreed between the parties hereto, that said parties of the second part shall be at all the expense which may be required for

advertisements and pay of agents in making sales or agreements for sales of said lands and that the price for which said lands shall be contracted for or sold to purchasers shall not be less than four dollars per acre, payable upon the ordinary terms as to times and payments prescribed by said party of the first part in making sales of its other lands. It is further agreed that as soon as the party of the first part shall obtain title to said lands and be in position to enter contract therefor, that said party of the second part shall transfer to it all agreements of sale for said lands or any of them then in his hands, and that therefrom the land commissioner of said party of th first part shall enter into a proper agreement of sale in the name of the party of the first part with the purchaser or purchasers named in such agreements. It is further agreed by the said parties hereto that said party of the second part shall be allowed and paid by the party of the first part to compensate him for advertisements and other expenses incurred by him in making sales or agreements of sales above provided for as follows: In case he shall have disposed of and sold or given contracts of sale for two-thirds of the total amount of said lands in said schedule named on or before December 31, 1881, then he shall receive ten per centum of the gross amount realized from said sales by the party of the first part, which shall be paid to him from time to time as the same shall be paid unto the party of the first part, but in case the party of the second part shall have disposed of a less quantity than two-thirds of said lands on said December 31,

1881, then his commission on said sales shall be only eight per centum of the amount realized therefrom by party of the first part, payable as aforesaid. It being agreed that until December 31, 1881, only eight per centum of said receipts from said lands shall be paid to the party of the second part hereunder and the remaining two per centum in case of a sale or disposition of two-thirds of said lands as hereinbefore provided shall be paid to the party of the second part on said 31st day of December, 1881, payments of said eight per centum as it shall accrue under the terms of this agreement to be made to the party of the second part on the first days of January and July of the years 1880 and 1881, respectively. The party of the first part hereby reserves over and across all of said lands a strip at least one hundred and fifty feet in width for right of way, snow fences and other railroad purposes for the use of the St. Cloud and Lake Traverse Railway Company where the lines of said company's road are now located or shall be hereafter located across said lands or any of them. It is further understood between the parties that the first party shall promptly notify the second party as often and as soon as it shall receive title to said lands or any of them, and said second party shall within sixty days from date of receiving any such notice complete the sales of the lands named in such notice by having the purchasers thereof enter into contracts in the usual form with the party of the first part and a failure on the part of any purchaser to comply with this provision shall be considered as releasing the lands agreed to be sold to him from this agreement.

In witness whereof the parties hereto have duly executed these presents, this 17th day of July, 1880.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY,
W. B. ANGUS, Vice-President,
JOHN IRELAND."

The Contract of March 30, 1883.

A copy of the contract bearing date March 30, 1883, may be found at page 22 of the Record, and is as follows, to wit:

"Whereas a certain agreement between the St. Paul, Minneapolis and Manitoba Railway Company, party of the first part, and the Rev. John Ireland, party of the second part, bearing date the 17th day of July, A. D. 1880, by which the party of the second part was given the sole and exclusive right to sell and locate settlers upon a certain lot of lands in the counties of Big Stone and Traverse, in the State of Minnesota, which lands are particularly described in said contract and among other provisions of said contract, it provides: That the party of the first part shall notify the party of the second part as often and as soon as it shall receive title to said lands or any of them, and said second party shall within sixty days from the date of such notice complete the sales of the lands named in such notice by having the purchasers thereof enter into contract in the usual form with the party of the first part, and a failure on the part of any purchaser to comply with this provision shall be considered as releasing the lands agreed to be sold by him

by this agreement. Now, therefore, the contract herein referred to having expired on the 31st day of December, 1881, and the railroad company not yet having acquired title to the lands in question, it is now agreed between the railroad company and the Rev. John Ireland that when title to these lands are acquired by the railroad company, and notice of same is given to Rev. John Ireland he shall have the privilege and right at any time within 60 days of date of said notice, of purchasing for himself or for such parties as he may designate (due regard being had as stated in supplement to said contract for settlers who may have obtained any claim upon such lands previous to the date of said contract) any or all of the lands included in said contract not to exceed the amount of 50,000 acres at uniform price of four dollars per acre, ten per centum of all receipts from said lands at the above price to be furthermore paid to the said Rev. John Ireland according as the moneys are received by the company, when such lands shall be purchased by Rev. John Ireland or those whom he may designate, the condition of sale usual with the company shall be observed, or at least the interest upon the purchase-money shall be paid from the date of purchase to the fifteenth day of December following, when the usual condition shall be enforced.

(Signed) JAMES B. POWER,
Land Commissioner
St. P., M. & M. Ry. Co.,
JOHN IRELAND.

OFFICE OF THE LAND DEPARTMENT,
St. P., M. & M. Ry., March 30, 1883."

As to the first contract, that of July 17, 1880, the land department held:

> "It is apparent upon the face of the instrument that the first agreement entered into between Ireland and the railway company merely constituted him an agent, and invested him with authority to locate settlers upon the lands embraced in the schedule attached thereto, and to make sales to said parties and to pledge and bind the railway company to make titles for said lands whenever it should obtain the title from the Government. * * * It follows that Ireland is not a purchaser within the meaning of the act." &c. (Record, pp. 44 and 45.)

But, as to the second contract, dated March 30, 1883, that department held that inasmuch as the contract gave Ireland the "right and privilege of purchasing for himself or for others, &c," after receipt of notice from the company that it had acquired title, he was a *bona fide* purchaser within the meaning of the act of March 3, 1887, notwithstanding the fact that the company never acquired title, never gave such notice, and he never did, nor could have exercised the conditional option given him, and NEVER PURCHASED AN ACRE OF THE LAND.

Analysis of the Contract of 1883.

It will be noted: The first and second paragraphs of the above contract simply recite the rights of

both Ireland and the company under the old contract of July 17, 1880, which had expired by the limitation contained in it.

The third and last paragraph, after reciting the *expiration* of the old contract, proceeds to set out the new arrangement between Ireland and the company as follows:

First. That *when* the company acquires title and gives Ireland notice of this fact, he shall have "*the privilege* and *right* of *purchasing* for *himself* or *for such parties* as *he* may designate," at any time within sixty days of date of said notice.

Second. The only description of the lands embraced in this "privilege and right of purchase" is, "Any or all of the lands included in said contract (the first, covering 66,527.01 acres) not to exceed 50,000 acres."

Third. The price agreed on was $4.00 per acre, ten per cent. of which sum was to be paid to Ireland out of moneys received by the company from purchases by himself, or by those he might designate.

Contract a Mere Option.

This contract is wholly *one-sided* and is known in law as a unilateral or option contract without consideration, and cannot be enforced by either party, in law or equity.

(1) The company gives Ireland the "privilege and right" of purchase, without requiring him to buy. He may take 50,000 acres, or 1,000 acres, or he may decline to take any whatever.

(2) The company requires no consideration for this privilege of purchase, and Ireland does not agree to pay any.

(3) The company exacts no penalty, forfeiture, or indemnity in case Ireland should decline to avail himself of the privilege of purchase.

(4) On Ireland's part, he agrees to nothing whatever. He does not agree to pay any consideration for the privilege or option of purchase—does not agree or bind himself to take an acre of the land, or pay any penalty, forfeiture, or damages in case he should not.

(5) There being no binding contract on the part of either party, to either sell or buy any part of the land, it is neither a purchase nor contract to purchase.

This agreement gave Ireland no "privilege or right" whatever as to the land embraced therein, until after he received notice from the company that it had acquired title to the land, and he did not agree to do anything then or thereafter.

Law of the Case.

Section 5 of the act, under which Ireland claims, expressly confines its relief and benefits to "*bona fide purchasers*" of railroad lands, hence such a

purchaser must show a *bona fide* conveyance from the company to entitle him to its provisions. The courts define such a conveyance or contract as follows:

> "When we speak of a *bona fide* contract, agreement, or covenant, we mean one that is legal, valid, subsisting; such a contract as imposes legal obligations, and may be enforced in the judicial tribunals of the country."
>
> Am. & Eng. Ency. (2d. ed.), p. 615, quoting from Hale *vs.* Darter, 10 Humph. (Tenn.), 95.

In the important case of Williamson *vs.* Berry, 8 How., 544, this court, speaking of special acts of the New York Legislature authorizing one Clark as trustee to sell property, held:

> "We now proceed to the other points certified. Upon the first of them, relating to the premises having been parted with by Clark to DeGrasse, upon a consideration other than cash, we remark that sale is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."

The above case is cited and approved in Hutchmaker *vs.* Harris, 38 Pa. St., 498.

In the well-considered case of Butler *vs.* Thompson (92 U. S., 2 Otto, 412), referring to the instrument in question in that case, the court said:

"As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the statute of frauds but that it is void upon common-law principles. * * *

Let us examine the argument. Blackstone's definition of a sale is 'A transmutation of property from one man to another in consideration of some price.' 2 Bl. 446. Kent's is 'A contract for the transfer of property from one person to another.' 2 Kent, 615. Bigelow, Ch. J., defines it in these words: 'Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor.' Gardner *vs.* Lane, 12 Allen, 39, 43. A learned author says: 'If any one of the ingredients be wanting there is no sale.' Atk. Sales, 5. Benj. Sales p. 1, n. and p. 2, says: 'To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised.'

How, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller unless there be likewise a purchaser? These authorities require the existence of both. The essential idea of a sale is that of agreement or meeting of minds by which a title passes from one and vests in another. A man cannot sell his chattel by a perfected sale and still remain its owner. There may be an offer to sell, subject to acceptance,

which would bind the party offering, and not the other party until acceptance."

After quoting these definitions the court says:

"Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale."

In Richardson *vs.* Hardwick, 106 U. S., 252, the court, in passing upon an unilateral or option contract, declares the law to be:

"The written contract gives him the privilege, or, as counsel call it, an 'option' to become equally interested in the land by paying one-half of the purchase-money, within two years after its date. The contract, of itself, did not vest him with any interest or estate in the land. It merely pointed out the mode in which he might acquire an interest, namely, by paying a certain sum of money within a certain time.

It is clear from the terms of the contract that Richardson (vendee) was not bound by it. He did not agree to purchase any share in the land or to pay Hardwick any money. The contract gave Hardwick (vendor) no cause of action against Richardson. The latter was not bound to become interested in the land, or to pay any money thereon, unless he chose to do so."

It is needless to say that the Supreme Court refused to decree specific performance of this contract in favor of the vendee.

See also—

Smith *vs.* Reynolds, 3 McCrary, 157.

In Dorsey *vs.* Packwood, 12 How., 126, the syllabus is as follows:

> "An agreement, whereby the purchaser of a plantation bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle, and stock as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means or with one-half of the profits of the plantation, was deficient in mutuality. The son-in-law was not bound to render any services or pay any money. It was a *nude pact.* It was not an alternative obligation upon the son-in-law, because the election to pay his half out of the profits would be merely paying with another man's money."

In passing on the case the court declares:

> "But there is one characteristic necessary to give it validity as a binding contract in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey (son-in-law) whatever. He is not bound either to render services or pay money as a consideration for one-half of the land. Packwood could not support a suit upon it to compel Dorsey to do anything. It is not an alternative obligation because Dorsey is not bound to perform either alternative."

In Clark on Contracts, page 16, the author says:

> "Looking at contracts, then, in the light of a promise" we may say that there are three stages necessary to the making of that sort of agreement which results in a contract: (1) There must be an offer; (2) There must be

an acceptance of the offer, resulting in a promise; and (3) the law must attach a binding force to the promise, so as to invest it with the character of an obligation."

See also—

Stitt *vs.* Huidekoper, 17 Wall., 385.

Johnson *vs.* Jacobs, 42 Minn., 168.

Harvey *vs.* Duffey, 99 Cal., 401; 33 Pac. Rep., 897.

Clark on Contracts, pp. 34–35, and cases cited.

Grant *vs* Buchanan, 46 Minn., 254.

Emerson *vs.* Graff, 29 Pa. St., 358.

Conkey *vs.* Peach, &c., Co., 16 C. C. App., 8.

Wenham *vs.* Switzer, 15 U. S. App., 302.

It is passing strange to us that the Supreme Court of Minnesota, in its decision sustaining the instrument in question as a valid contract of purchase, should have so entirely ignored its own decisions construing similar instruments. It is the more remarkable, too, since the attention of the court was specifically drawn to these cases in the brief filed on behalf of Gertgens in that court.

In the case of Bailey *vs.* Austrian, 19 Minn., 535, which was an action based upon an agreement between the plaintiffs, who were engaged in a general foundry business, to take from the defendants during a specified period, and the defendants promised to furnish all of the pig iron which the plaintiffs might want in their said business during the term mentioned at specified prices. In deciding the case the court said:

"If this state of facts establishes any contract, it is a contract of *mutual promises*—that is to say, the sole consideration for defendants' promise to supply is plaintiffs' promise to purchase, and *vice versa*.

The general rule (with exceptions not important in this instance) is, 'that a promise is not a good consideration for a promise, unless there is absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.' 1st Parsons on Contracts, 449, and note *z*.

Upon the foregoing state of facts the engagement of plaintiff was to purchase all of said pig iron which they might want in their said business during the time specified; but they did not engage to *want* any quantity whatever. They did not even engage to continue their business. If they saw fit to discontinue it on the very day on which the supposed agreeement was entered into, they were at entire liberty to do so at their own option, and, whatever might have been defendants' expectations, he is without remedy. In other words, there is no absolute engagement on plaintiffs' part to 'want,' and of course no absolute engagement to *purchase* any iron of defendants.

Without such absolute engagement on plaintiffs' part, there is no 'absolute mutuality of engagement,' so that defendant 'has the right at once to hold 'plaintiffs' to a positive agreement.'

The testimony excluded was properly excluded, since it did not tend to establish a valid contract on the part of defendant, and was therefore immaterial."

This entire lack of mutuality of engagement, shown in the above-mentioned case, likewise characterizes the agreement between Ireland and the railroad company in the case at bar. And although the Supreme Court of Minnesota very properly held there was no binding contract in that case, yet, without overruling it, or even attempting to distinguish it from the Ireland case, but ignoring it entirely, the court held the Ireland contract to be a valid contract to purchase. That there was no more mutuality of engagement in the Ireland case than in the Bailey case must be evident to any one who will take the trouble to *analyize* it.

Certainly it will not be contended that Ireland agreed to "want" a single acre of land described in the instrument entered into any more than Bailey did in the case cited above. Neither will it be contended that the railroad company "had the right at once to hold Ireland to any positive agreement."

This case of Bailey *vs.* Austrian, *supra*, has been approved and followed by the Supreme Court of Minnesota, among others, in the case of Stensgaard *vs.* Smith (43 Minn., 11).

Further considering the illegality and insufficiency of this mere option or privilege to purchase lands to confer upon Ireland any estate or interest, either legal or equitable, in the land, we beg to call attention to the following general authorities upon the subject.

The force and effect of such a contract is stated in 28 Am. & Eng. Ency. of L., p. 77, as follows:

"The right to purchase land is frequently the subject of contract, and such a right may be styled an option. It is not an estate in land, and an option contract is not a contract of sale."

In Warvell on Vendors, vol. 1, p. 187, under the head of "Option of Purchase," cited in the above authority, he says:

"The remarks of the foregoing paragraphs have reference, however, only to the bilateral contracts; for an agreement whereby the owner of land merely gives to a prospective vendee the right, option, or refusal to purchase at any time in the future, confers upon the party having such option no interest, either legal or equitable, in the land.

It is not a contract of sale within any definition of the term, and at best but gives to the option holder a right to purchase upon the terms and conditions, if any, specified in the agreement or proposal."

Thus we find in one of the latest Text Books on Vendors and Purchasers the established doctrine held by all the courts of this country and England that an option contract of purchase of lands neither conveys any interest or estate therein to the vendee nor is such a contract, in any sense, a contract of sale.

Bishop in his work on Contracts enlarged edition, sec. 321, thus succinctly states the rule:

"A mere offer or promise, not accepted, involves no concurrence of wills, and it can never constitute a contract.

Again, at sec. 78 the same author, says:

> "A common method of entering into this contract is for one person to make an offer to another; then, if the latter accepts it, the contract becomes thereby perfected. And unless both are bound, so that an action could be maintained by either against the other for a breach, neither will be bound."

See also—

Section 318, same volume and cases cited.
Smith on Contracts, sec. 154, quoting Pothier.
Wait's Action and Defences, vol. 1, p. 102.
Fisher *vs.* Seltzer 23 Penn. St., 308.
Ritenour *vs.* Mathews, 34 Indiana, 279.

Then if, as held by this court and other authorities cited above, Ireland's contract giving him the "privilege and right of purchase" conveyed to him no interest or estate in the land, nor was even a contract of sale of the land to him, he cannot be held to be a "*bona fide purchaser*" in any legal sense, for it would seem utterly impossible for him to be a purchaser of lands under a contract which gave him no sort of interest, in law or equity, in the lands claimed to have been purchased. Mary M. Bostwick *et al.*, 80 Ill., 138.

In the proceedings before the land department, Ireland, over the objection of protestant (Record, pp. 22 and 23), attempted to engraft upon the written agreement a different meaning than it bears upon its face and by its unambiguous terms, through oral conversations between himself and the

railway company's land commissioner, had antecedent to the execution of the instrument. This testimony was very properly ruled out by the trial court. (Record, pp. 71 and 72.)

The following is the testimony on this point:

"Q. Did you have a conversation with any official of said company in 1883, relative to the aforesaid agreement, and make a new arrangement with the company respecting said land? If so, describe the conversation as nearly as you can remember."

"A. In March, 1883, I had such conversation with James B. Power, land commissioner of the St. Paul, Minneapolis and Manitoba Railway Company. I said to him, 'My contract made a few years ago is now expired without the railroad having secured title so far. I have been to a very large expense inducing immigrants to settle on those lands. I now propose another agreement. I will buy myself a large quantity of those lands, and holding them as my own, deal directly with the settlers, putting on the lands any prices I may choose, for my own benefit.' Mr. Power answered, 'Very well.' I replied, 'I wish you to understand very well that I am buying those lands as my own, so that I may make as far as I think expedient, a profit out of them.' He said, 'The lands are yours. I hope you will make two hundred thousand dollars out of them.' He then began jotting down the nature and conditions of the contract."

"Q. Was the conclusion reached by reason of that contract subsequently reduced to writing in the form of an agreement or contract; if so, how was that contract executed?"

"A. It was so reduced in writing, the contract was executed in duplicate by Mr. Power and myself, he retaining one copy, and I the other."

Said Ireland then introduced in evidence, and had filed as the contract referred to by him in his testimony, an instrument in writing dated March 30, 1883.

The written agreement will be examined in vain for any such language, terms, or conditions as stated in this alleged conversation.

That it was incompetent for him by such prior conversation to vary or modify the terms of this unambiguous written instrument, is abundantly settled.

Willard *vs.* Taloe, 8 Wall., 557.
Ins. Co. *vs.* Mowry, 96 U. S., 544.
Stitt *vs.* Huidekoper, 17 Wall., 385.

Where, as in the case at bar, there is no uncertainty, it is conclusively presumed that their whole agreement and the manner and extent of their undertaking were included in the writing.

McKinley *vs.* Williams, 20 C. C., 312.
Bell *vs.* Mendenhall, *et al.*, 80, N. W. Rep., 843 (Minn.).
DeWitt *vs.* Berry, 134 U. S., 306.
Seitz *vs.* Brewers' Refrigerating M. Co., 141 U. S., 510.

Equally and for the same reason was it incompetent for Ireland to attempt to make out of the contract something other than it bore on its face by having the witness Stoddard testify that it was a "general understanding among employes of said company" that said lands were "Ireland's lands." This testimony was also properly rejected by the trial court (Record, p. 78). Not only was it a mere declaration of unknown persons and strangers to the contract and hence not binding on the railway company, but, even if made by the proper officials of the company, it could not affect the character of the instrument, for, "an erroneous construction of it by them (the parties) will not control its effect."

Railroad Co. *vs.* Trimble, 10 Wall., 367.

Bailey *vs.* Hannibal & St. John R. R. Co., 17 Wall., 96.

Bast *vs.* First National Bank of Ashland, 101 U. S., 93.

But Ireland's subsequent conduct, as shown by his own evidence, proves conclusively that he understood the agreement according to the tenor of the written instrument:

On the 28th day of March, 1889, the company notified Ireland that it had obtained title to 26,000 acres of the lands embraced in his contract and "requested him to make what selection he wished." He admits that he selected but 16,000 of the 26,000 acres. (Record, p. 25.)

Again, he also put in evidence a contract he had made with one Tyler on the 30th day of December,

1889, as to some of these lands, in which occur the following:

> "The said Ireland has a right at *his own choice* to select the lands he *wishes to purchase* definitely from the said railway company, and those not chosen are no longer to be covered by the present contract between the said Ireland and the said Tyler." (Record, p. 30.)

Here, then, more than five years after the date of this contract, we have the interpretation Ireland himself put upon his agreement with the railway company. It proves conclusively, just what we contend, that it was a mere naked option and that he was in no way bound to take any part of the land. That, to use his own language in the Tyler contract, he had a right to "his own choice" as to lands he might wish to purchase. Moreover, it is just such an agreement as the parties intended to make. The company was not concerned as to whether sales were made to Ireland or to others, as it was to pay Ireland ten per cent. of the receipts for his services in making sales, whether made to himself or to others. And Ireland did not want to be bound to take any of the lands which he could not sell. All he wished was just what he bargained for, viz., the *privilege* of purchasing at ten per cent. on the amount received, in which case, if he made no sales he received nothing, but he ran no risk and incurred no liability, since he could not be compelled to either sell or purchase any part of the lands. It was a mere speculative venture. If he could make sales of any of the lands for more

than $4.00 per acre, he wanted not only his ten per cent. from the company, but any amount which he could get over and above that sum. In such case, he wanted to have the right to purchase them himself and convey to the parties to whom he sold; if he could sell for but $4.00, he got his ten per cent., and the company would convey directly to the purchaser.

Part Performance and Past Consideration.

In the Land Department, speaking of the consideration for Ireland's contract, the Commissioner in his decision awarding Ireland the land, said:

> "Even admitting protestant's contention that there must be shown some consideration rendered by Ireland in order to constitute him a purchaser in good faith, there is sufficient proof to meet this requirement.
>
> We look to the evidence again and find Ireland to testify that the consideration was the labor he had given and was giving to bring settlers along the line of the road and the large expenditures which he had made and was making for the same purpose." (Record, p. 49.)

Now, suppose it be true that Ireland, after his last contract of 1883 was executed, proceeded to look up purchasers for these lands, and incurred expense and labor in so doing, surely no lawyer would contend that such acts and expenditures can be held part performance of the contract which requires no such things to be done. They were

entirely voluntary on Ireland's part, because the contract does not contemplate them as part of its provisions to be performed by Ireland.

Ireland could not prove any consideration as in compliance with the terms of the instrument other than as was expressly required therein.

Custian *vs.* St. L., &c. Co., 60 N. W. Rep., 425 (Wis.)

Besides being outside of the contract, it is perfectly evident that Ireland's efforts to sell these lands at a price in advance of what he was to pay the company for them, was a matter of pure speculation for his own benefit in realizing profits, and in no sense for the special benefit of the company.

In Gorden *vs.* Darnell, *supra*, the Supreme Court of Colorado enters into a very full discussion of the question whether such voluntary services can be considered an election or part performance.

In that case a bond conditioned to convey a mining claim upon payment of a certain sum within a given time containing no clause giving obligee possession during option, and having no consideration expressed for the option given, was passed on by the court, as follows:

> "A bond of this nature is, in the first instance, a mere option to the obligee, to purchase at any time within the period therein limited, upon simple compliance with the terms stated. Until such acceptance by the obligee, there being neither mutuality nor consideration, it imposes no obligation whatever on either

party, and for that reason is subject to revocation by the maker at any time prior to acceptance. Such a bond lacks the element of a valid and binding contract. * * * Not being enforceable to any degree against the purchaser, he is equally incapable of enforcing it against the seller, for contracts to be obligatory upon either party must be mutual. Until acceptance by the obligee or performance of some act equivalent to an election to purchase under the terms mentioned therein, it is *nudum pactum*. * * * Such acceptance, together with a tender of performance, renders the remedy mutual and entitles the purchaser to a specific performance. The minds of the contracting parties are said to meet upon the happening of these events, and the offer to sell ripens into a valid contract, just as it would if made and concluded at the time of acceptance."

It being contended by the defendants in that case that they went into possession at about the time of the contract, expended money in improvements—all with knowledge and without objection of plaintiffs, who stood by and allowed this to be done and allowed obligee to make a contract of sale, to a third party, the court said:

"If these facts be admitted, they do not render the bond irrevocable, unless it can be said that they amount to an election to purchase and are in compliance with the terms of the contract. Nor can it be considered equivalent to an election to purchase the mine, so far as the written contract is concerned, for that prescribed a different mode of election, viz., the payment or deposit of the purchase-money;

and it is equally difficult to comprehend how taking possession and making improvements can be considered as performence in this case, at least under the written obligation in evidence, since none of its provisions contemplate such act."

The doing of things which the promisee does for himself is not consideration for an offer by the promisor.

Bisham *vs.* Therasson, 30 Atl. Rep., 969 (N. J. Ch.).

Of course it is admitted Ireland never either entered upon or made any improvements upon the land in controversy herein, but that they were settled and improved by the defendant.

The option being without consideration for its making and not having been accepted by Ireland in compliance with its terms, is a *nude pact.*

Provident, &c., Co. *vs.* Mills, 91 Fed., 435.
Weaver *vs.* Burr, 8 S. E., Rep., 743, 31 N. W., 736.
Fliason *vs.* Henshaw, 4 Wheat., 225.
Wilkerson *vs.* Havenbach, 58 Mich., 574, and
Sayer *vs.* Mead, 33 N. W., 355.

Right of Option Contingent.

The agreement of March 30, 1883, constituted, as we have shown, a unilateral option. But it did not even give Ireland an absolute, unconditional option. His right thereto was dependent on a

contingency over which he had no control, which neither did nor can happen, to-wit, the acquirement of title by the railway company. The instrument gave Ireland no "privilege or right" to purchase, make sales, or do *anything else* touching the lands until after he received notice from the company that it had acquired title. No present right whatever was given him. He had no more right to deal with these lands than the merest stranger, until the contingency arose upon which his right of option depended. That no present purchase was provided for, or contemplated by the parties, is conclusively shown by the statement that there shall be paid to Ireland according as the moneys are received by the company, "*when* such lands *shall be purchased* by Rev. John Ireland or those he may designate," &c.

This option agreement is clearly distinguishable from one in which there is a conditional contract of sale with possession given thereunder to become absolute upon the happening of a contingency.

In the latter case there is nothing further to be done by either party except to await the event upon the happening of which the contract *eo instanti* becomes absolute from the date of its execution. Such a contract is irrevocable by either party and its consummation is not dependent upon the will of either, as the minds of both parties met at the making thereof. But, not so in the case at bar. Their minds never met nor could meet, by the very clear and explicit terms of the agreement, until the happening of the contingency. Even

then, whether any contract of purchase whatever would be made, depended wholly upon the will of Ireland. His mere silence, when he received notice from the company that it had acquired title, would have caused his option to lapse, or he might have selected one acre and let it lapse as to all the balance. There being no agreement on Ireland's part to take an acre of the land, it follows that the railway company could not have controlled his will, even though the contingency had happened; and as the contingency never happened no contract of purchase was either made or initiated. Where neither party could force the other to perfect a sale, there could certainly be no grounds for claiming a sale had been made absolute or conditional, legal or equitable.

> Bishop on Contracts, enlarged edition, section 78, and cases cited.

Again, before the option in the case at bar could become a contract binding on either party, it would have been necessary for Ireland to have complied with its terms by not only selecting the specific lands he would take out of the 50,000 acres and notify the company thereof, but also by paying or tendering the amount stated in the option, to wit, $4 per acre.

> Coleman *vs.* Applicant, 68 Med., 21.
> Dickinson *vs.* Dodds, 2 Chan. Div., 463.
> Potts *vs.* Whitehead, 5 C. E. Green, 55.

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No Consideration.

The instrument in controversy is not only a mere conditional option agreement, without mutuality, giving Ireland no estate or interest in the land whatever, simply pointing out the method by which, in the event of the happening of the contingency, he may or may not, according to his own personal will, acquire a right to some part or all of the land; but it is without any consideration whatever, and hence vitally defective on that account.

However much it may be insisted the act of March 3, 1887, is remedial in character and requires a liberal construction, it will hardly be contended that a simple executory agreement to purchase land from a railroad company not based upon a valuable consideration, would support an application to purchase under its provisions.

The authorities on this point are numerous and uniform, and although, we hardly think it necessary, we will call attention to the following:

Bishop on Contracts, enlarged edition, at section 35, says:

> "The consideration is a prime element in every contract."

And in section 40 he lays down the correct doctrine thus:

> "It is, therefore, the rule of our law prevailing, both in courts of law and in those also of equity, that no executory, simple contract is valid without consideration."

Again, in section 77, still further pursuing the same subject, he says:

> "A promise by one, with nothing in return is void; as, if he undertakes in writing to convey land to another who neither agrees to buy nor pays anything for the promise."

This illustration of a void contract by the learned author is precisely in point in the case at bar; if it had been based upon the facts in this case, it could not have been more so.

Comyan on Contracts, at page 9, thus comprehensively states the law:

> "A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other is *totally void in law;* and a man cannot be compelled to perform it."

Chitty on Contracts, p. 6, says:

> "In the case of a contract not under seal, a consideration is absolutely necessary to give it validity."

Again, at p. 24, he says:

> "Consideration essential in law and equity in all contracts not under seal."

Travis on Sales, p. 1, quotes Blackstone's definition of a sale as follows:

"Sale, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value; for there is no sale without a recompense; there must be a *quid pro quo.*"

Hughes on Contracts (1902), section 35, says:

"An executory simple contract is a mutual agreement; between competent parties, touching a lawful subject-matter, for a valuable consideration, expressed with certainty and satisfying the statute of frauds.

An analysis of this definition shows that it possesses four essential elements, to wit:

1. A mutual agreement.
2. Between competent parties.
3. Touching a lawful subject-matter.
4. For a valuable consideration.

If one or more of these four essential elements is wanting, *there is no contract.*"

See also Wait's Actions and Defences, vol. 1, pp. 90 and 92.

Even the land department recognized the necessity for a consideration to support the contract, and sought to find it in the oral testimony of Ireland as to labor which he had given and was giving to bringing settlers along the line of the road and his expenditures for that purpose. Of course it is admitted that no consideration appears in the contract itself.

This court has settled the question as to the necessity for a valuable consideration to support such a contract of purchase of land from a railway

company, as would entitle the purchaser to relief under the provisions of the act of March 3, 1887.

In the case of the United States *vs.* Winona and St. Peter R. R. Co. (165 U. S., 463), the court in its syllabus holds that in order to bring one within the terms of the act he must have "purchased in good faith, and paid value for the lands."

In its opinion, at page 481, the court, speaking of the said act of 1887 and of the act of 1896 confirming the right and title of *bona fide* purchasers, said:

> "We have been referred in the arguments of this and other cases to the debates in Congress, and to the reports of the committees of the two Houses to whom bills were referred as confirmatory of the conclusions we have reached, but it is unnecessary to consider any of the evidence derived from these sources, if, indeed, it is open to consideration, for the language of the two acts is clear, and fully discloses the intent of Congress. Our conclusion is that these acts operate to confirm the title to every purchaser from the railroad company of lands certified or patented to or for its benefit, providing that he purchased in good faith, paid value for the lands, and providing also that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

And at page 480 of said opinion the court, speaking of the 4th section of said act of 1887, wherein the word "purchaser" was used, said:

> "It does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent."

Neither by the courts nor the land department has any looser construction been placed on the words of the act. In all cases in which they have been passed on there has been either an absolute sale or contract to sell such as could have been enforced by either the vendor or the vendee in an action for specific performance. The fact that in some cases there was an agreement accompanied by posession to the vendee and the consideration paid either in cash or its equivalent by improvements and cultivation of the land does not remove the words of the statute out of the foregoing rule. For such agreements even though oral upon such consideration and possession, inconformity with the terms of the contract, have always been held binding and enforcible.

Antecedent Consideration Insufficient.

In the decision in the land department, as well as in that of the Supreme Court of Minnesota, it is at least intimated that Ireland's alleged expenditures in bringing settlers on the land prior to his contract of 1883, should be held to be consideration for said contract. Before referring to the authorities controverting this proposition, we call the attention of the court to the fact that Ireland was

an agent of the company under his first contract, and was to receive for his services a per cent. commission on the gross receipts of moneys from lands Ireland might dispose of as such agent, but his commission depended on the company's acquiring title to the lands and upon its getting $4.00 per acre for the same.

As stated in the second contract, the old contract expired by limitation December 31, 1881, the company not having received title to the lands.

Can it be said that the company owed Ireland one cent under this old contract for "services previously rendered" as claimed?

As stated in the first contract, his commission depended entirely upon the company's acquiring title to the lands, he may have contracted to purchasers, as well as upon receiving the purchase price, which it never did.

But suppose for the sake of argument it be admitted that the company did owe Ireland for his services rendered prior to the date of the second contract. Will any lawyer contend that what the company owed Ireland under the first contract, and which he had already earned, could furnish a valid consideration for the new contract?

If the company owed Ireland anything under the old contract, no promise by the company to pay this old debt could support a new undertaking.

It must be borne in mind that in the option of 1883 there is no provision that Ireland shall settle the land as consideration for the option or other-

wise, but only that he shall have the right to purchase the same on the payment of $4.00 per acre.

We call attention to authorities cited on this point in 3 Am. & Eng. Ency., 838:

> "The consideration must consist of a present or future act; a past act cannot serve as a consideration for a promise."

In 2 Am. & Eng. Ency., 444, under *bona fide* purchaser, the authorities hold:

> "A *bona fide* purchaser must have received his purchase upon some new consideration, or must have relinquished some security for a pre-existing debt due him."

Warvell on Vendors, in note to section 11, page 612, cites as holding that an *antecedent debt is not sufficient to support a contract* the cases of—

Wood *vs.* Chapin, 13 N. Y., 509.
Cummings *vs.* Boyd, 83 Penn. St., 372.
Moon *vs.* Ryder, 65 N. Y., 441.
Clark *vs.* Flint, 22 Pick. (Mass., 243).
Menges *vs.* Condit, 23 N. J. Eq., 315.
Hinds *vs.* Pugh, 48 Miss., 276.

Ireland attempts to sustain his alleged purchase from the company by pleading an old debt or claim for services rendered under an expired contract, said to be due him from the company.

Under the above definitions of legal consideration and *bona fide* purchaser, it will be seen that the courts universally hold that Ireland's claim of an antecedent debt due him by the company furnishes

no consideration for the new contract, but does furnish the very reason and ground upon which such contracts are held invalid.

"Past services rendered" by Ireland to the company cannot therefore sustain the cantract of 1883, which fails to state any consideration whatever on its face.

Neither, as pointed out in the above definitions of a *bona fide* purchaser, did he relinquish some security for a pre-existing debt due him from the company, but, on the other hand, actually relies on a "pre-existing debt" due him from the company as consideration for his contract.

The alleged contracts of sale made by him, about which Ireland testified, but which testimony was ruled out by the trial court, in legal effect, were made subject to his option and in nowise change or characterize the same. They created no equities in favor of Ireland. But it is unnecessary to present reasons for its exclusion, as this court cannot upon any theory, and will not, consider such testimony or its admissibility.

At no angle from which the case can be viewed does there appear to be any law or equity in favor of either Ireland, or O'Connor, the defendant in error.

O'Connor, who is Ireland's private secretary, is the legal owner of seven thousand acres of said indemnity land, embracing the land in controversy, all of which he received through a trustee of Ireland under a contract from the latter (Record,

p. 108) without ever having been in possession of any part thereof.

In the hearing in the land department, Ireland introduced O'Connor as his witness to testify as to these sales. His testimony may be found at pages 78 to 82, both inclusive, of the Record. On cross-examination, in speaking of the contracts which he held, including one for the land in controversy, he testified as follows:

> "Q. Was there a form used expressly for the land you bought of the bishop?
>
> "A. There was some printed forms, some which we ordinarily bought from supply houses; the writing on those forms, filling out of those forms varied under certain conditions.
>
> "Q. Would you be willing to furnish a sample copy of the form in question to be placed in evidence in this court?
>
> "A. I would not wish to do anything that might jeopardize my claim without consulting my own attorney.
>
> "Q Then you decline to allow the sample copy to be used in this case, do you?
>
> "A. I hold all my papers, protect my own claims, and will not produce them until necessary.
>
> "Q. In other words, until you have to?
>
> "A. I decline to answer.
>
> * * * * * *
>
> "Q. Were those contracts which were issued to the bishop's secretary, yourself, peculiar to themselves?
>
> "A. I think I shall decline to answer any question relating to John P. O'Connor personally in relation to his purchase, for the reason

that my attorneys are not here to protect me in any rights I may have and which I think I have.

"Q. Then any question that may be asked you with reference to the seven thousand acres or more of land which you have bought from the bishop you decline to answer?

"A. I decline to answer, for the reason that I fear I may jeopardize my claim, as stated before, without consultation with my attorneys.

"Q. You mean by that that you would like to consult your attorneys as to what your answers should be?

"A. I mean just what I said."

We forbear comment upon this testimony, but merely add that O'Connor might have placed himself in a more favorable light by such candor and frankness as the gravity of the matters at issue demanded, rather than by the flippancy and apparent evasion shown by him.

The Cases in the Land Department.

The Supreme Court of Minnesota, in its opinion in the case at bar, undertook to show that in certain cases decided in the land department agreements similar in character to that of Ireland had been sustained and the parties held to be *bona fide* purchasers under the act of March 3, 1887. We insist that each of the cases cited by the court is clearly distinguishable from the Ireland case.

The material facts in the case of S. L. Campbell (12 L. D., 247), cited by the court as aforesaid, were:

> "March 1879, the railway company issued a circular executed by it stating 'in order that the settlement of these lands may not be delayed the company will issue permits to parties desiring to enter upon them and commencing improvements. These permits will entitle the parties to the lands from the company on the terms herein proposed, on its securing title thereto, on condition that they shall in good faith commence improvements at once, and shall put under cultivation within twelve months from the date of the permit, at least 40 per cent. of the lands taken, and that they shall within 60 days after receiving notice from the land commisioner of the company that the company has secured title to and is ready to make a formal contract or deed of the lands, make such payments as may then be due on the lands and execute contracts or notes and mortgages to secure the deferred payments as hereinafter provided. * * * To secure the immediate settlement and cultivation of the lands, the company offers them on the following easy terms: payments will as a rule be required at the rate of one dollar per acre per annum, with interest on the deferred payments at the rate of 7 per centum, payable annually.
>
> It was further provided therein that the first payment of principal and interest would be due one year thereafter, but that no payment thereof would be required until the company was able to convey the lands by warranty deeds; and that special credits should be given the purchaser in the gross amount of

> $3.00 per acre for breaking and seeding the land, such credits to be applied 'on the first payments due on the lands, principal and interest.'"

Thereafter Campbell applied for a section of land, and on May 2, 1879, a permit attached to said circular was duly signed and executed by him and said railway company providing, among other things:

> "Mr. S. L. Campbell having applied for this permit (as appears by his signature hereto) the Southern Minnesota Railway Extension Company hereby authorizes him to enter upon and improve the whole of section No. 1, of Township 102, of Range No. 32, in Martin county, Minnesota, in accordance with and subject to the terms and conditions of the foregoing circular, which is hereby made a part of this permit. The price fixed upon the tract herein is seven dollars per acre. In case of compliance with the terms of this permit and of said circular, and in case the said company obtain title to said land the same will be conveyed to S. L. Campbell by warranty deed. It was then provided that in case the failure of Campbell to comply with the same such instrument should be considered as a lease entitling the company to take possession of the land and improvements thereon, as for unlawful detention after expiration of lease, and giving to said Campbell only permission to remove growing crops thereon."

Campbell thereupon duly entered into possession of the lands, cultivated and improved them, fully

complying with the terms of the contract, as found by the Secretary in his decision (12 L. D., 249), as follows:

> "Entered into possession of same, placed buildings thereon, and caused breaking to be done. The improvements made by him on the section are estimated to be worth $4,000.
>
> It clearly appears from an examination of his contract with the railway company that the same was a *bona fide* transaction, wherein he agreed to pay for said lands at the rate of seven dollars per acre, he to receive a rebate of three dollars per acre, for each acre of the land he should cause to be cultivated within a certain time."

It will be observed that all of the essential elements of a valid contract were present in the Campbell case. There was immediate possession taken pursuant to the contract, prompt cultivation and improvement of the land at large cost, and strict compliance otherwise with the conditions precedent stipulated in his contract. Here are found mutuality of obligations between him and the company and strict compliance on Campbell's part. There can be no question but that this contract could have been enforced by Campbell if the company had acquired title.

For a full discussion of this class of cases under option contract, we call attention to the case of Gorden *vs.* Darnell, 5 Colorado, 302, where all the authorities are collected and cited. The court say:

> "Where a money consideration for the option is *expressed* or where the bond to convey requires the purchaser to develop and improve the property as a consideration for the option, or in part performance for the conditions of the sale, and these terms have been duly complied with, a totally different case is presented from that where, by the terms and conditions of the instrument, nothing is to be paid and nothing done under it by the purchaser, until he makes his election to purchase.
>
> The former case contains all the elements of a binding contract, and the purchaser, although free to reject the offer of sale, may elect to accept within the time limited."

The court cites numerous cases from Massachusetts, Pennsylvania, Illinois, California, and from Fry on Specificic, Performance, section 64, 166, 167, 177, and 179.

The Supreme Court of Minnesota in commenting upon this case said "as to Campbell the contract was nothing but a permit to occupy and an option to buy. The only real distinction between that case and the one at bar is that Campbell personally entered upon the land covered by the agreement, occupied the same and made valuable improvements."

This statement, though not complete, makes a very broad distinction between the two cases. And when it is considered that the railroad circular, which was made a part of the contract promised a deed to the land provided he took immediate

possession and should "in good faith commence improvements at once, and shall put under cultivation within twelve months from the date of the permit, at least 40 per cent. of the lands taken," &c. All of which conditions were strictly complied with by Campbell it makes a very different case indeed. There was possession, improvements, and payment of part of the purchase-money by the breaking of the land for which he was to be allowed $3.00 per acre. It will be remembered Campbell's contract was for the whole section and the railway company did acquire title to a portion of it and conveyed the same to Campbell, thereby executing the contract in part, but in so doing Campbell was not credited for any portion of his improvements to the amount of $4,000, made on the other portion of the land. As before stated, as soon as Campbell entered on the land and made improvements provided for by the contract they constituted payment *pro tanto*, and this was not only of itself an acceptance of the offer of the railway company, but, under the express wording of the circular, required such purchaser to execute contracts or notes and mortgages to secure deferred payments.

As to the contract of Austin *vs.* Leuy (21 L. D., 507), also referred to by the Supreme Court of Minnesota, it will be found that Austin was in possession of the tract as a home for twenty years, had made $3,000 improvement thereon, as well as cultivating the land for a number of years.

The Secretary's decision quotes numerous written promises or agreements by the company to convey

the land to her when it acquired title, and his decision also points out that she had paid the company the agreed price and consideration for the land.

An examination of the Secretary's decision in that case will show that the Supreme Court of Minnesota was greatly in error in its intimation that there was no written agreement, and that the Secretary held "it was immaterial as to how the contract was evidenced."

Both of these contracts fall clearly within the definition of valid option contracts under the decision of the Colorado court, *supra*. In that decision the court distinguishes between option contracts wherein the vendee is required by the contract to perform, and does perform, acts or labor for the improvement or development of the land contracted for, and those contracts wherein the vendee or purchaser is not required to perform any such conditions before the time appointed for him to elect.

In the former, the performance by the vendee of conditions as to improvements, &c., before election constitutes a part performance which makes the contract valid and enforcible in the courts. The other class, where no consideration is expressed in the contract, and no requirement of a performance of such conditions prior to election is made, are held by the court to be non-mutual *nudum pactum*, and not enforcible in law or equity.

By this rule of construction held by the courts both Campbell's and Austin's contracts were valid

and enforcible in the courts, while on the other hand, Ireland's contract utterly failed to be a contract to purchase. There is no consideration expressed, no act or condition on his part to be performed, required; and under the terms of the contract, he was to pay nothing for his privilege of option or purchase, neither was he required to do anything under the contract prior to the date of election he might make, when notified to do so by the company. In other words, he was neither to pay anything nor do anything for the privilege of election.

In the case of Granden *vs.* LaBar (23 L. D., 301), also referred to by the Supreme Court of Minnesota, that court in its discussion of the holding of the Secretary quotes the following part of said decision.

> "It is charged that the stock had no market value, but the fact, if true, does not affect the question of consideration."

The court singularly omits to say that the Secretary also said:

> "Its principal and immediate value (that is the preferred stock of the railroad company) as it seems to me, arose out of the fact that it was convertible into the lands of the company (at the rate of $3.00 in stock for an acre of land), situated within certain prescribed limits. Those lands were in an unsettled country, but they had some present and much prospective value, and that value whatever it was, inherred in the stock that was convertible into them."

It is thus seen that the Secretary not only recognized the fact that a valuable consideration was essential to support Granden's contract to purchase, but that the $3.00 of the preferred stock of the railroad company which they paid for each acre of the land purchased by them had "some present and much prospective value," and hence their purchase was valid and they were entitled to the remedies provided by section 5, of the act of March 3, 1887.

Whether Ireland had any Contract, or was a Bona Fide Purchaser, are Questions of Law.

After discussing at length the proper construction of section 5, of the act of March 3, 1887, and holding that under such law, as construed by it and applied to the undisputed facts, Ireland was a "purchaser" of the land in controversy, the Supreme Court of Minnesota holds that such questions so argued by it are not of law, but of fact, and hence, not reviewable by the courts.

If the construction of a legislative act and of its applicability to undisputed facts are not of law, pure and simple, then would one be hardly conceivable.

The question whether the paper upon which Ireland was permitted to purchase was a contract of purchase, within the meaning of the act, is also a question of law, pure and simple.

> "The validity of a contract is a question of law. Whether a contract is void because

against public policy, for being made on Sunday, in violation of statute, or *for want of consideration*, are questions of law."

Culver *vs.* Banning, 19 Minn., 303.
Fowler *vs.* Scully, 72 Pa. St., 456.
Pierce *vs.* Randolph, 12 Texas, 200.
Heller *vs.* Crawford, 37 Ind., 279.

"The construction of written instruments, their signification and legal effect, are matters of law for the court."

Brown *vs.* Huger, 62 U. S. (21 How.), 305.
Estes *vs.* Boothe, 20 Ark, 583.
Richmond, &c., Co., *vs.* Farquar, 8 Blackford, 89.
Borill *vs.* Pimm, 36 Eng. L. & Eq., 441.
Holmes *vs.* Crane, 6 Ala., 570.
Kidd *vs.* Cromwell, 17 Ala., 648.
Rogers *vs.* Carey, 47 Mo., 235.
Woodman *vs.* Chestley, 39 Me., 45.
Bank *vs.* Inloes, 7 Md., 380.
Carpentier *vs.* Thiston, 24 Calf., 268.
Shepherd *vs.* White, 11 Texas, 346.
Addington *vs.* Etheridge, 12 Gratt., 436.
Cox *vs.* Freedley, 33 Pa. St., 124.

Wells on Questions of Law and Fact, sec. 46, thus states the rule:

"The general principal is well settled to be that the construction of the terms of an instrument is matter of law for the court. * * * Also the legal effect of an instrument."

"What is the meaning, validity, and effect of a contract are conclusions of law."

Latham *vs.* Westervelt, 26 Barb., 256.
Chapin *vs.* Potter, 1st Hilton, 366, cited in note, p. 9, Ramm on Facts.

"The construction of agreements for the sale of land is a matter of law for the court."

Am. and Eng. Ency. of L., vol. 28, p. 101.

The same authority, vol. 21, p. 518, thus states the rule:

"The general rule is well settled that the construction or interpretation of all written instruments belongs to the court alone." Attention is also called to the authorities cited in note 1 in support of the text.

If, then, "the validity of the contract" for "want of consideration," as well as the construction of its terms "and its signification and legal effect," are questions of law for the court, it is impossible for us to conceive of any rule of law which would make the decision of the land department upon these questions ones of fact, and therefore conclusive.

In the case at bar, we insist Ireland had no contract whatever. That the paper upon which he based his claim, and upon which he was permitted to purchase, lacked the essential elements of a contract. That it fell short of being a contract for the following reasons:

1st. It is a mere unaccepted option based upon a contingency which never happened, and hence it never ripened into a contract of purchase.

2d. It is not a contract for want of mutuality. The minds of the parties never met as to the purchase of the tract in controversy.

3d. If in all other respects regular and valid it is void for want of consideration, is a mere *nude pact*.

These are purely questions of law, and must be decided before it is at all necessary to consider whether his pretended purchase was made *in good faith* or not; for, if he had no valid contract, then he is not a purchaser at all and was not lawfully entitled to purchase the land.

He must stand or fall as his contract may be held to be valid and sufficient or the contrary. That alone constitutes his case. If he had no contract, he has no case. We have fully discussed these propositions in other parts of this brief and need not repeat the argument here.

In the Cyclopedia of Law and Procedure, vol. 5, p. 719, a *bona fide* purchaser is thus defined:

> "One who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell, without

notice," &c. Citing 1 Perry on Trusts, sec. 239 (quoted in Woolridge *vs.* Thiele, 55 Ark., 45, 17 S. W., 340; Fargason *vs.* Edrington, 49 Ack., 207, 4 S. W., 763, and Alden *vs.* Trubee, 44 Conn., 455).

Pomeroy's Equity Jurisprudence, sec. 745, thus defines such purchaser:

> "The essential elements which constitute a *bona fide* purchaser are therefore three: a valuable consideration, the absence of notice, and presence of good faith."

Ramm on Facts, in note to page 9, cites White *vs.* Brown, 14 How., Prac. Rep., 282, as holding question of "*bona fide* holder and owner" as one of law.

In the case at bar all the evidence as to Ireland's alleged purchase is undisputed. No variant inferences of fact can be drawn therefrom. Under the evidence he is either a purchaser or not, according as the law shall be construed. If there were a controversy as to Ireland's citizenship or as to his having any paper writing, or as to any other essential fact leading up to his alleged purchase, the finding of the land department would be conclusive thereon.

But whether all the facts as to the alleged purchase, being uncontroverted, make him a "purchaser" within the meaning of the act is purely a question of law.

It is the settled law of this court that where the land officials err in construction of the law or in

application of the law to the undisputed facts, their action is reviewable by the courts.

Moore *vs.* Robbins, 96 U. S., 530, 535.
Johnson *vs.* Fowsley, 13 Wall., 72.
Sanford *vs.* Sanford, 139 U. S., 642.
Silver *vs.* Ladd, 7 Wall., 219.

In the case of Moore *vs.* Robbins, *supra*, the court, speaking through Mr. Justice Miller, held:

> "The Supreme Court of Illinois, in their opinion of this case, come to the conclusion that this final decision of the Secretary is not only conclusive on the Department, but that it also excludes all inquiry by courts of justice into the right of the matter between the parties.
>
> The whole question, however, has been since that time very fully reviewed and considered by this court in Johnson *vs.* Towsley, 13 Wall., 72 (80 U. S., 485). The doctrine announced in that case and repeated in several cases since is this:
>
> That the decision of the officers of the land department, made within the scope of their authority on questions of this kind is, in general, conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and imposi-

tions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

Again in Sanford *vs.* Sanford, *supra*, the court, through Mr. Justice Field, said:

> "But where the matters determined are not properly before the department or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necesarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. Quinby *vs.* Conlan, 104 U. S., 420, 426; Baldwin *vs.* Stark, 107 U. S., 463, 465. In such cases a court of equity only exercises its ordinary jurisdiction to prevent injustice from a misconstruction of the law or the machinations of fraud."

The authorities cited by the Minnesota Supreme Court in its decision herein show no deviation from the principles as above enunciated.

The case of Bishop *vs.* Hyde (66 Minn., 24) was taken by writ of error to this court and its decision is reported in 177 U. S., 281. The controverted question of fact before the land department was whether the applicant had made a contract to

divide the land with others; and the Minnesota Supreme Court held that there was evidence to sustain the finding of the land department on that point. In affirming that decision this court, speaking through Mr. Justice Miller, said:

> "No one can read the testimony which was offered before the land officers without perceiving that there was sufficient in it to justify a finding that the applicant had made a contract in direct violation of the statutory provisions. It is true he himself testified that he was to secure Mr. White "on a one-half interest," but the contract itself was not produced, having in some way disappeared, and Mr. McDonald, who was a party to it (for it was a joint contract between White, the applicant, and McDonald) testified that he was to have half of the land. We do not stop to inquire whether an agreement to give a mortgage for money advanced comes within the letter or spirit of the statute, for there was enough in testimony to justify the conclusion of the department that it was a contract to divide the land when obtained, and it is not the province of the courts to review such finding of fact."

Assuming in that case there had been no evidence of an agreement by the applicant to divide the land, then no other inference can be drawn from the above decision than that this court would not have sustained the finding of the land department against the applicant on that point.

Or to put it in another form: Assume the undisputed facts showed that a mortgage on the land

was given by the applicant to another, and the land department held such mortgage to be within the purview of the statute against division, and hence, as before, decided against the applicant, would this court, holding as a matter of law that the statute did not cover a mortgage, sustain the decision of the land department?

But as we understand the decision of the Minnesota court in the case at bar it is that "all matters relating to the applicant's status as a purchaser in good faith, as well as his citizenship," are conclusively determined by the land department even though the facts be undisputed.

Although we do not question the citizenship of Ireland, yet as an illustration of the extreme position taken by that court herein, let us assume that a Filipino, under his present status of non-citizenship as held by this court, had as vendee of the railway company applied to purchase land under the 5th section of March 3, 1887, would this court sustain a decision of the land department allowing him to purchase?

If a court would do so, why was it necessary for the Federal court to discuss the question of citizenship at all in U. S. *vs.* S. P. Ry. Co., 88 Fed. Rep., 832, wherein citizens grantees of aliens who had purchased from the railroad were held to be proper applicants "especially in view of the amendatory and supplemental act of Congress of March 2, 1896, under which *bona fide* purchasers for value of such lands are confirmed in their purchases, even though they be aliens"?

Of course, the questions of residence and cultivation of land by an applicant and of the mere proofs thereof belong peculiarly to the land department as held in Vance *vs.* Burbank, 101 U. S., 519. So as to whether in fact surveys have been made or other lands have been actually taken for the grant.

Quinby *vs.* Conlan, 104 U. S., 420.

In Carr *vs.* Fife, 156 U. S., 494, the only question at issue was whether the applicant had abandoned the land, clearly one of fact; and in Catholic Bishop *vs.* Gibbon, 158 U. S., 155, the questions considered, as stated by the court, were, "whether there was at Vancouver a missionary station, and also a like question, if one existed, how much land it occupied."

But seemingly the authority on which the Minnesota court chiefly relied as a basis of its decision on this point is Green *vs.* Humford, 50 Pa. St., 215.

In that case the plaintiff sold a horse for $115.00 of which $100,00 was counterfeit money. His vendee sold it to the defendant, and the court left to the jury the question as to whether the defendant at the time of his purchase had such knowledge of the facts of the fraud in the original purchase that he could not become a *bona fide* purchaser for value.

We fail to perceive how that decision can be germain.

As an illustration of what is a question of fact, as to which the findings of the land officers would

be conclusive, the case of Lee *vs.* Johnson, 116 U. S., 48, is a good one, but in the opinion therein the court says:

> "If, however, these officers mistake the law applicable to these facts, or misconstrue the statutes, and issue a patent to one not entitled thereto, the party wronged can resort to a court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner."

The construction of any written instrument, such as the option offered by Ireland in the case at bar, is for the court.

Baer *vs.* Minock, 87 N. W., 1045 (Mich.).

If on a trial before a jury such option had been offered and received in evidence even without objection, the question as to whether it would constitute Ireland a purchaser within the act of March 3, 1887, would not have been left to the jury as a question of fact, but the court would have been compelled to instruct a verdict one way or the other, according to the construction he might place on said act.

Ireland's Bona Fides a Legal Conclusion.

Warvell on Vendors, at p. 609, says:

> "A purchaser in good faith, in the language of the books, must be innocent. * * * The first essential ingredient of legal innocence is

> 'good faith,' a term which legal lexicographers, courts, and writers have avoided defining much the same as 'fraud' and other words of common daily use."

In the Encylopedia of Pleading and Practice, vol. 12, p. 1031, under the head of "Legal Conclusions," it is said a statement "that the pleader was an innocent purchaser is a legal conclusion." Citing Wing *vs.* Hayden, 10 Bush. (Ky.), 280, as authority.

In that case the court said:

> "An allegation in an answer that a defendant is 'an innocent purchaser,' was held insufficient and a conclusion of law, not being equivalent to a statement that he purchased without notice of the appellee's homestead right."

The same authority, at p. 1033, states that "unlawful," "illegal," or "wrongful" are conclusions of law.

As to "Fraud," it is stated:

> "Whether fraud be alleged in the declaration bill, or set up by way of defence in the plea, answer, or replication, it is essential that the facts and circumstances which constitute it should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer."

Vol. 9, p. 687, citing among others—

Fogg *vs.* Blair, 139 U. S., 118.

St. L. & C. Ry. Co. *vs.* Johnson, 133 U. S., 577.

See also—

Ritchie *vs.* McMullen, 159 U. S., 241.

"The reason of this rule is that fraud is a conclusion of law from facts stated and it is a well-settled rule of pleading that facts and not legal conclusions are to be pleaded."

Vol. 9, p. 688.

Clearly it seems that in the case at bar this question before the land department was one of pure law, and its decision is reviewable by the courts.

We have felt constrained to treat of the issues herein somewhat more exhaustively than the amount involved would seem to warrant, but in the decision of this as a test case by stipulation are involved fifty other quarter-sections of land held by as many heads of families similarly situated as is the plaintiff in error herein. Nor is it the pecuniary interest alone that stimulates to special effort, but of greater importance by far is the loss or preservation of the homes which these settlers have for more than a decade cultivated and improved, and in which they have reared their families, in the hope and expectation that they would remain permanently their own. These reasons are sufficient to call for the careful deliberation of the court in reaching its conclusion in the case at bar, aside

from the correct legal principles to be established.

Firmly believing the conclusions of the lower court not to be in conformity with such principles, we invoke the aid and judgment of this court in a reversal of that decision.

Respectfully submitted.

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